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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 12, Original

STATE OF CALIFORNIA, *Plaintiff,*

v.

STATE OF WASHINGTON, *Defendant.*

MOTION FOR LEAVE TO FILE A COMPLAINT WITH ATTACHED COMPLAINT.

EDMUND G. BROWN,
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STATE OF CALIFORNIA,	*Plaintiff,*
v.	
STATE OF WASHINGTON,	*Defendant.*

MOTION FOR LEAVE TO FILE A COMPLAINT.

The State of California, by Edmund G. Brown, its Attorney General, asks leave of the Court to file its complaint against the State of Washington, submitted herewith.

Dated, February 11, 1958.

EDMUND G. BROWN,
Attorney General of the State of California,
WALLACE HOWLAND,
Assistant Attorney General of the State of California,
LEONARD M. SPERRY, JR.,
Deputy Attorney General of the State of California,
Attorneys for Plaintiff.

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STATE OF CALIFORNIA,	*Plaintiff,*
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STATE OF WASHINGTON,	*Defendant.*

COMPLAINT.

The State of California, by Edmund G. Brown, its Attorney General, acting pursuant to a resolution of the California Legislature, brings this suit in equity against the State of Washington, and for its cause of action alleges as follows:

I.

SUMMARY STATEMENT OF THE CASE.

1. This is an action to enjoin and restrain the enforcement of statutes and regulations of the State of Washington which unreasonably discriminate against interstate commerce in wine produced in Cali-

fornia (referred to herein as "California wine") by citizens of California and transported into Washington.

2. The laws of the State of Washington permit the production of wine within and the importation and transportation of wine into that state for sale and consumption therein. Of all wine sold and consumed in Washington, about 50% is produced in Washington (referred to herein as "Washington wine"), about 45% in California, and about 5% in other states and in foreign countries. The discrimination herein complained of arises from the different methods prescribed by the laws of Washington for the distributing, marketing, sale and pricing of California wine moving in interstate commerce for distribution, sale and consumption in Washington, as compared with those prescribed for Washington wine moving in the local trade and commerce of that state, viz.:

(a) California wine is subjected to state monopoly control of its distribution, marketing and pricing within Washington from which Washington wine is exempt. As a result California wine is denied direct access to the competitive privately-owned channels of distribution through which Washington wine moves from producer to consumer.

(b) California wineries are denied the privilege, granted to and enjoyed by Washington wineries, to promote the purchase and use of their products by direct contact with licensed retailers throughout Washington.

(c) A public agency of the State of California, duly authorized and directed actively to promote the sale and use of California wine, is denied the opportunity to carry on in Washington sales promotion activities of a type and in the manner utilized by Washington wineries in promoting the sale and use of Washington wine.

The purpose and effect of this discriminatory scheme of regulation of the lawful traffic in wine is unreasonably to suppress competition in the distribution and sale of wine in Washington as between Washington wine and California wine and thereby to confer upon producers of Washington wine commercial, economic and other advantages over producers of wine located in California.

3. The Washington statutes and regulations are challenged in this action on the ground that:

(a) They discriminate between intrastate and interstate trade and commerce in the marketing and sale of wine in Washington in violation of the Commerce Clause of the United States Constitution; and

(b) They deny to citizens of California privileges granted by the State of Washington to its own citizens, in violation of the Privileges and Immunities Clause of Article IV, Section 2, of the Constitution.

(c) The resulting suppression of competition in the lawful Washington market between California wine transported into Washington in in-

terstate commerce and wine produced locally within that state is not authorized by the Twenty-first Amendment to the United States Constitution.

(d) The Washington laws here challenged are not intended to and do not have the effect of promoting the cause of temperance; they do not in design and effect make use of the police power of the State of Washington to protect and promote the public health, safety and morals of the people of that state; nor do they serve the legislative purpose which the Twenty-first Amendment was enacted to promote.

II.

JURISDICTION.

4. Jurisdiction over this case, to which a state is party, is vested in the original jurisdiction of this Court by Article I I, Section 2, Clause 2, of the Constitution of the United States. Further, since this is a controversy between two states, the jurisdiction of this Court is both original and exclusive by virtue of section 1251(a)(1) of Title 28 of the United States Code.

III.

CONSTITUTIONAL PROVISIONS INVOLVED.

5. The following provisions of the United States Constitution are involved in this action:

(a) Article I, Section 8, Clause 3, which confers upon Congress the power "to regulate Commerce . . . among the several states . . ."

(b) Article IV, Section 2, Clause 1, which provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

(c) Section 2 of the Twenty-first Amendment which provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

IV.

THE TRADE AND COMMERCE INVOLVED.

A. The Distribution of Washington Wine.

6. Since 1933, the statutes and regulations of the State of Washington have authorized under specified conditions the production, sale and consumption of wine within that state, and the importation and transportation of wine thereinto (Rev. Code Wash., Title 66). During the ten years last past the sale and consumption of wine in Washington has averaged about 2,000,000 gallons annually.

7. Within Washington there are 13 licensed wineries engaged in the production of wine from fruit grown in that state. During the year ended June 30, 1956, Washington wineries sold more than 1,100,000

gallons of Washington wine. All of this wine, except some 2,500 gallons, was sold within Washington and comprised about 50% of total wine sales in the State during that period.

8. More than 70% of all Washington wine is produced from grapes, the balance being produced from other fruits and berries. About 93% of all Washington grape wines contain more than 14% alcohol by volume, comprising what are known generically as "dessert wines". The balance are wines known generically as "table wines". All of these Washington grape wines are of types similar to those produced in California and are competitive therewith.

9. In contrast to the distribution of California wine in Washington (post, par. 14), the distribution of Washington wine from producer to ultimate consumer is carried on exclusively by privately-owned business establishments. There are in Washington 135 wine wholesalers licensed to purchase Washington wine from any winery located in Washington. Substantially all Washington wine is marketed by the wineries through the medium of these wholesalers. Each wholesaler sells and distributes Washington wine to retail licensees within a marketing area prescribed and designated by the winery producing the wine so distributed. For this purpose the wine wholesalers employ salesmen, most of whom have regular routes and schedules for calling upon the trade and soliciting orders. The sale of substantially all Washington wine to retail licensees involves direct contact between salesmen representing the wine wholesaler

and the retail licensee, generally in person and sometimes by telephone.

10. There are in Washington more than 4,800 privately-owned retail establishments licensed to sell wine, regardless of its place of origin, at retail to the ultimate consumer, for consumption either on the premises where sold, or elsewhere.[1] More than 4,000 of these retail licensees are licensed to sell wine in bottles not to be consumed on the premises where sold; most of these licensees are grocery stores, chain stores, supermarkets and taverns. More than 3,000 of these retail licensees are authorized to sell wine by the drink for consumption on the premises where sold; such licensees are for the most part taverns, restaurants, hotels, clubs and dining places on airplanes, boats and trains. Numerous licensees, notably the taverns, hold both types of license.

11. Although such conduct is prohibited to producers of California wine, producers and wholesalers of Washington wine deal directly with any or all of the 4,800 retail licensees in marketing and promoting the sale and consumption of their respective Washington wines. Washington wineries, acting individually or through the medium of a trade association, utilize the services of the wine wholesalers in distributing to retail licensees sales aids, merchandising displays and sales promotion literature intended for consumer use. Generally known to the trade as

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[1]As used herein the term "retail licensee" means only retailers licensed to sell *wine* under one or more of the several types of wine retail license issued by the State of Washington.

"point-of-sale" materials, they include literature describing the various types of wine, wine selection charts which show the preferred use of different types of wine, recipe books, and display materials such as cardboard bottle holders and bins, and devices to insert in opened bottles to aid the user in pouring wine.

12. The Washington wineries determine, each on the basis of its own judgment, in the light of competitive conditions in the market, the prices at which their respective wines shall be sold to the 4,800 retail licensees. There is no control whatsoever asserted by the State of Washington over the level of prices at which Washington wine is sold at any stage of its distribution from producer to consumer.

B. The Distribution of California Wine.

13. During the year ended June 30, 1956, about 1,100,000 gallons of wine were sold in Washington which were produced in other states and in foreign countries and imported or transported into Washington. Of this, more than 996,000 gallons, or better than 90%, was produced in California and transported into Washington. The value of such sales to California wine producers was approximately 2½ million dollars.

14. With the exceptions of wine produced in Washington and of beer containing not more than 4% of alcohol, the State of Washington monopolizes the sale of all alcoholic beverages in that state. For this purpose, the State of Washington, acting through the Washington State Liquor Control Board (herein-

after referred to as "the Board"), owns and operates 71 retail liquor stores in the more populous communities throughout the state. In addition, the Board has appointed, in cities and towns in which no state retail store is located, some 123 so-called "agencies" authorized to sell liquor at retail. The state retail stores and agencies are all supplied from a central warehouse at Seattle, Washington, to which all wine purchased by the Board is delivered.

15. Since 1948, and for some time prior thereto, the Board has not purchased, stocked or sold any wine produced in Washington. Under authority of the statutes herein complained of the Board purchases varying quantities of about 30 brands of California wine. Stocks of all the California wines so purchased by the Board are carried in each of the 71 state retail stores. The 123 so-called agencies of the Board stock and sell some but not all of the California wines purchased by the Board.

16. There are many types and brands of California wine besides those which are purchased by the Board for stocking state stores and agencies. In addition to the California wine purchased by the Board for this purpose, the Board will purchase other California wines pursuant to special orders therefor placed with the Board by retail licensees. Retail licensees do a substantial business in California wines obtained through such special orders. The Board, however, does not disseminate to retail licensees any information concerning the availability of these other California wines. Neither does it permit the California

wineries to contact retail licensees in Washington, by mail or otherwise, to promote their wines by making their availability known (Regulations, Wash. Liq. Cont. Bd. No. 113(d), 1956). Although the Board is the only source from which retail licensees in Washington can obtain California wine, it performs none of the sales promotion activities and services which the private wholesalers of Washington wine render to retail licensees in promoting the sale and consumption of Washington wine.

17. On June 30, 1956, the population of Washington dependent upon the Board as its only source of California wine, was estimated to be 2,667,000. In the twenty years prior to 1956 the population of Washington has grown more than 61% from an estimated 1,653,000 in 1936. During the same period consumption in Washington of wine produced in other states and in foreign countries as reflected by Board sales decreased more than 25% from 1,431,902 gallons in 1936 to 1,065,114 gallons in 1956. During this same period total consumption of all wine in Washington increased about 22%, from 1,865,226 to 2,276,713 gallons; whereas, the aggregate of wine sales in all of the other 16 states operating state liquor monopolies increased 324%, from 5½ million gallons in 1936 to 23½ million gallons in 1955.

V.

DESCRIPTION OF STATUTES, REGULATIONS AND OTHER ACTIONS OF THE STATE OF WASHINGTON DEEMED TO BE UNCONSTITUTIONAL.

18. The State of Washington, by statutes duly enacted,[2] administrative regulations promulgated pursuant to statutory authority, and other authorized official actions, discriminates against interstate trade and commerce in California wine in the following respects:

A. The Channels Through Which California Wine Must Be Distributed Are Monopolized.

19. Section 66.24.210 of the Revised Code of Washington provides:

> "All wines manufactured or produced in domestic [i.e., Washington] wineries may be sold by the manufacturer or producer thereof direct to persons holding licenses entitling them to sell wine at retail under the provisions of this title, or to licensed domestic wine wholesalers, or to licensed domestic wineries."

The same section, however, provides with respect to California wine that:

> "No wines except domestic [i.e., Washington] wines shall be sold within the state except to the liquor control board or by the board through the state liquor stores."

These provisions effectively establish a monopoly control over the sale and distribution within Washington

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[2]The several statutory sections and regulations referred to herein are set forth in full in Appendix A to this Complaint.

of all California wine. Washington wine, however, is expressly exempted from any such form of control.

B. Trade and Quantity Discounts Are Denied to Retail Licensees Purchasing California Wine for Resale.

20. The above mentioned provision that no wines except Washington wine "shall be sold within the state" except to or by the Board does not prohibit retail licensees from re-selling to consumers California wine purchased by such licensees from the Board. However, retail licensees can purchase California wine only from the state-owned stores and agencies (Regulations, Wash. Liq. Cont. Bd. No. 32(d), 1956). In so doing they are required to pay the same retail price per bottle as any individual consumer.

21. With respect to retail licensees authorized to sell in bottles not to be consumed on the premises where sold, it is provided that:

> "... Such licensee shall pay to the state liquor stores for such wines the current retail price." (Rev. Code Wash. § 66.24.370.)

22. Section 66.24.440 of the Revised Code of Washington establishes a discount of not less than 15% from retail prices fixed by the Board on sales to Class "H" retail establishments. These retailers are licensed to sell wine and other liquors for consumption on the premises where sold. While such 15% discount is granted on sales of distilled spirits and malt liquor of over 4% alcoholic content, the statute prohibits the granting of such discount on all wine sold

by the Board (§§ 66.24.440, 66.24.410). As noted above, the Board deals principally in California wine and not at all in Washington wine.

23. The Board makes no delivery of wine to retail licensees except at the Board's retail stores and agencies. The Board's retail price for each bottle of wine does not include the cost of delivery or cartage to the business establishment of the retail licensee. With respect to Washington wine, however, the Board requires that Washington wineries post "the delivered prices" at which Washington wine is sold to retail licensees, "which prices shall be uniform for all retailers within the state." (Regulations, Wash. Liq. Cont. Bd. No. 81, 1956.) Wholesalers of Washington wine not only deliver wine to the business premises of retail licensees but also generally make a practice of arranging shelf displays with the wine so delivered.

24. The effect of these provisions is that California wine resold by retail licensees to ultimate consumers, either by the bottle or by the drink, is subjected to two retail markups, one added by the state-owned retail store and the other by the licensed retail outlet re-selling to the consumer. This is contrary to the established practice, permitted by Washington law, concerning the pricing of Washington wine.

C. California Wines Are Subjected to Excessive and Unreasonable Markups and Minimum Prices.

25. Section 66.16.010 of the Revised Code of Washington authorizes the Board to fix the price of all liquor, including wine, sold at state-owned retail stores and agencies. Acting pursuant to this author-

ity, ever since 1941 the Board has determined its retail prices for California wine by applying to its landed cost an excessive and unreasonably high percentage of markup.

26. From its inception in 1933, until some time in 1941, the Board at all times uniformly applied the same markup to both the wines and the distilled spirits in which it dealt. Between 1941 and 1949 the Board applied a 35% markup to all table wines and distilled spirits, but increased the markup on dessert wines to 52%. To these markups were added applicable taxes. In 1949 the Board applied a markup of 49½% to distilled spirits, 58% to table wines, and 68% to dessert wines, to which was added a 3% sales tax.

27. Continuously since 1951, when applicable tax rates were last changed, the Board has adopted and utilized a markup of 45% for distilled spirits, 54% for table wines, and 68% for dessert wines, plus the applicable state sales tax of 10%. These differentials in markup, and especially those between table wines, of which Washington production is almost negligible, and dessert wines, which comprise the greater part of the production of Washington wine, were not based upon any considered difference in the cost of merchandising and doing business in these products, nor upon any considerations of breakage or spoilage, or other expense incurred in their handling. In fact, no cost studies were ever made by the Board as between the cost of handling wine or any classification of wine, and distilled spirits.

28. The said markups which have been adopted and used by the Board in the computation of its wine prices have at all times since June 1, 1947, been minimum markups. Continuously since that date the Board has implemented the said minimum markups on California dessert wines by also establishing arbitrary and unreasonably high minimum prices therefor. These minimum prices have been applied to California dessert wines regardless of the price at which they were purchased by the Board from the California producer. Continuously since about December 1, 1951, the said minimum price has been $0.92 per one-fifth gallon. During this period the Board has made purchases of California dessert wine at prices and at landed costs to the Board which resulted in the actual markup being well in excess of 100%.

29. The purpose and effect of such markups and minimum prices has been and is to further enhance the economic advantage and competitive position of the producers of Washington wines to the detriment of the California wine producers and the consuming public within the State of Washington.

D. California Wine Cannot Be Sold in the Same Size Containers as Washington Wine.

30. Section 66.08.050(5) of the Revised Code of Washington authorizes the Board to "determine the nature, form, and capacity of all packages to be used for containing liquor kept for sale", including wine. Pursuant to this authority, the Board, by regulation, permits Washington wineries to utilize a wide variety of container sizes, including the economical and

popular pint size flat bottle or flask (Regulations, Wash. Liq. Cont. Bd. No. 66, 1956). A substantial and profitable business in this size is enjoyed by Washington wineries. The sale of flat pints of Washington wine is featured by certain types of retail licensees, notably the taverns. California wine, however, is available at the Board's retail stores only in fifth-gallon and one-gallon containers.

31. The Board maintains in its Seattle warehouse a stock of some twelve brands of California wine in one-tenth gallon round bottles, known in the hotel and restaurant trade as "one-half bottle" or "small bottle". With one exception, these are all table wines. This stock of tenth-gallon bottles is sold only in case lots pursuant to orders therefor placed at a state store or agency. Its sale to retail licensees is restricted to those purchasing for consumption on the premises operated by such licensees. These are principally hotels and restaurants. The Board has refused to sell California wine in tenth-gallon bottles to grocery stores and other retail licensees who sell for consumption elsewhere than on their premises. The sale of Washington wine, however, is under no such restriction. Tenth-gallons of Washington wine are stocked and sold by grocery stores and other retail licensees who sell for off-premises consumption.

E. Trade Promotion Work by California Wine Producers Is Subject to Discriminatory Restrictions.

32. Section 66.28.050 of the Revised Code of Washington prohibits any person, other than registered liquor salesmen dealing with the Board, from can-

vassing for, soliciting or receiving orders for the purchase or sale of California wine. However, the same section expressly permits producers and wholesalers of Washington wine to solicit orders from licensed retail wine outlets. As previously noted, retailers licensed to sell wine to consumers are not subject to any restriction based upon the place where such wine is produced.

33. In the same vein, by regulation the Board prohibits California wineries from engaging in any sort of trade promotion work with any of the 4,800 privately-owned licensed retail outlets in Washington. The regulation prohibits California wineries and their representatives from contacting or soliciting "directly or indirectly, by mail or otherwise" any retail licensee for the purpose of promoting or inducing the sale of California wine. The same regulation expressly exempts producers and wholesalers of Washington wine from this prohibition (Regulations, Wash. Liq. Cont. Bd., No. 113(d), 1956).

34. The statutes and regulations referred to in paragraphs 19 through 33, *supra,* have not been enacted or administered in the exercise of the police power of the State of Washington for the purpose of protecting the public health, safety and morals.

35. The intent and purpose of the said statutes, regulations and official action taken thereunder has been to confer a competitive economic advantage on Washington grape growers and wineries to the detriment of grape growers and wineries located in other states. By virtue of the geographic and climatic con-

ditions which largely control the American wine industry, these discriminations have their greatest effect upon wine produced in California.

VI.

EFFECTS OF THE DISCRIMINATORY WASHINGTON SYSTEM.

36. The effect of the statutes, regulations and other official acts of the State of Washington herein complained of his been and is that:

(a) The distribution of California wine in Washington has been monopolized by the State of Washington, while Washington wine is permitted to move through numerous, competitive and privately-owned channels of distribution selected and supervised by its producers;

(b) The minimum price at which California wine is available to consumers in Washington has been fixed and maintained by the State of Washington, as the monopoly distributor, at artificial and unreasonably high levels, whereas there is no control asserted by the State of Washington over the level of Washington wine prices at any stage of its distribution and marketing;

(c) The State of Washington, as monopoly distributor, sells California wine at the same price both to consumers and to retail licensees purchasing for resale, whereas those same retail licensees obtain Washington wine from sources which do not sell to consumers at any price. In

so doing, the State of Washington has destroyed the economic incentive of its retail licensees to deal in California wine;

(d) The promotion of the sale of California wine cannot be carried on by means of any contact, direct or indirect, between its producers and retail licensees in Washington. Neither the producers of California wine nor the State of California can promote the sale of California wine at the wholesale level because of the monopoly distribution of California wine in Washington and the refusal of the monopoly distributor to engage in any advertising or sales promotion work. The promotion of Washington wine is under none of these disabilities.

37. By reason of the foregoing, the quantity of California wine sold and consumed in Washington has been curtailed and, as a result, the public policies of the State of California in promoting the sale in interstate commerce of one of its principal resources have been frustrated, the economy of the State of California has been impaired, and its citizens discriminatorily denied the privilege of equal access to the channels of trade which lawfully supply wine to the consuming public in Washington. In placing the foregoing burdens upon interstate commerce in California wine, from which Washington wine is free, the State of Washington has been and is unreasonably discriminating against trade and commerce among the several states in violation of: (a) the Commerce Clause of the Constitution of the United States for

which neither justification nor authority can properly be found in the Twenty-first Amendment; (b) the Privileges and Immunities Clause of Article IV, Section 2, and (c) the Equal Protection Clause of the Fourteenth Amendment.

VII.

THE INTEREST OF THE STATE OF CALIFORNIA.

38. The State of California brings this action in its sovereign capacity:

(a) To assert and to protect its right as a state to perform functions of government in behalf of its people and, in so doing, to remain unrestricted and unhampered by officials acts of another state which contravene the Constitution of the United States;

(b) To discharge, in an appropriate manner, the obligation and duty imposed upon it by law to remove existing trade barriers against the sale of California wine which have no sanction in the Twenty-first Amendment; and

(c) To protect its economy against unwarranted discrimination by the official acts of another state and to obtain unobstructed access to the national market for a natural resource and industry which is so essential to the economy of the State that it is declared by law to be affected with a public interest.

A. The State's Trade Promotion Program.

39. It is the policy of the State of California to use the powers and the facilities of its governmental agencies to aid producers in the marketing of agricultural commodities including, specifically, grapes and the wine produced therefrom. (Calif. Agric. Code, §§ 1300.10, 1300.12(c), 1300.12a.) To effectuate this policy, the State has for many years engaged in an advertising campaign and a program of sales promotion activities of a commercial nature to promote the the sale and consumption of California wine. It carries on these activities in every state of the United States which does not prohibit, by its own laws, the sale and consumption of wine as a beverage and which permits advertising and promoting the sale of wine.

40. The administration and enforcement of the State's wine advertising and sales promotion program is a function of the California State Director of Agriculture (hereinafter referred to as the Director). Pursuant to the California Marketing Act of 1937 (Calif. Agric. Code, §1300.10 et seq.), in 1938 the Director issued a Marketing Order for Wine. Article III, section A of the Order in its current form provides:

> "There shall be established plans for advertising and sales promotion to maintain present markets or to create new or larger markets for wine produced in the State of California. Such plans may consist, insofar as funds are available, and as the [Advisory] Board may recommend and the Director approve, of programs of advertising, dealer service, trade promotion, publicity, market

development and expansion activities for the prevention, modification or elimination of trade barriers which restrict the free flow of wine produced in California to market, . . ."

41. To finance this program, the Director has approved a budget for the year ending June 30, 1958, for the expenditure of more than $2,700,000. To provide these funds, California law imposes a special form of excise tax upon each gallon of California wine prepared for market. The funds so provided are held and disbursed by the Director to defray the expense of the State's program. California law provides criminal penalties for violation of the Wine Marketing Order and the imposition and collection of the special form of excise tax has been upheld as a valid exercise of the State's police power.

42. The Director has approved and ordered into effect a wine advertising and sales promotion program comprising all of the activities described in the current program budget, a copy of which is attached hereto as Appendix B. The sales promotion activities of this program are carried on throughout the United States by 23 field service representatives of the State. Of these, 19 have business headquarters and are stationed in states other than California and as far distant as Boston, Massachusetts. In their promotion of the sale of California wine, 18 are assigned to work in territories comprising two or more states, in whole or in part. This distribution of manpower and the resulting concentration of sales promotion activities in other states reflects the fact that about 80% of all

wine produced in California moves in interstate commerce for distribution and sale to consumers located in states other than California.

43. Prominent in the sales promotion activities of the State is the preparation and distribution of large quantities of sales promotion material of the "point-of-sale" type. These include merchandising displays, posters and other forms of graphic sales aids intended for the use of wine retailers. They also include informational material intended for consumer use, such as wine selection charts, booklets describing the types and preferred uses of California wines, and recipe books. The annual cost of the preparation and production of these materials is about $150,000. They are produced in California and distributed to all states whose laws permit their use. Distribution throughout the Eastern states is made from a New York warehouse to which bulk shipments are made from California. The design, art work and content of these materials is largely the work of a national advertising agency employed for the purpose. The distribution, however, of these materials is a direct function of the State of California. It is effected largely on the basis of orders and requisitions for these materials received from the field service representatives stationed throughout the nation.

44. Each of the field service representatives has two motion picture films depicting the California wine industry and promoting the use of its products. Other copies of these films are held in reserve in California. These films are constantly being transported through

and into the several states for exhibition to groups of wine distributors, consumers and the general public, under the direction and at the instance of the field service representatives.

45. Other major features of the State's sales promotion program are the training classes for wine salesmen and "wine tastings" conducted by the field service representatives. Regular courses of instruction in the selection, care, use and serving of wine are given to the personnel of wine wholesaling organizations, selected retailers, and hotels and restaurants. Wine tastings are conducted for interested civic service and consumer groups. More than 80% of the California wine consumed in such instruction and demonstration is transported in interstate commerce from California to places of consumption in other states. In those states where the wine is purchased or procured from local stocks, there are generally communications and financial credits exchanged between persons in California and in such other states concerning the procurement of such wine.

46. It is estimated that throughout the United States there are about 3,800 wine wholesalers and about 285,000 retail outlets for wine. The expense of carrying on sales promotion work directly with any such number of retail outlets would be prohibitive. Experience has shown that the efficient and economical administration of the State's program depends upon the active assistance and cooperation of wine wholesalers. Effective use of their sales organizations, which have frequent and direct personal contact with

the retail trade which they serve, makes possible the promotion of California wine to an extent not otherwise attainable with the funds and personnel available. Hence, wine wholesalers are the focal point of contact with the wine distributing industry for the State's field service representatives. About 80% of the distribution of display materials and sales aids to wine retailers is made through the medium and agency of wine wholesalers. Likewise, about 70% of the informational literature intended for consumer use is distributed through the medium of wine wholesalers and their respective organizations. It is estimated that the greater part of the motion picture exhibitions, salesmen's instruction classes and wine tastings are the direct result of or are facilitated by the liaison which the field service representatives have with wine wholesalers throughout the several states where they exist. By reason of the discriminations complained of herein, the State of California has been and is effectively precluded from carrying on in Washington sales promotion activities of the kinds herein described and which are permitted by Washington law in furtherance of the sale and consumption of Washington wine.

B. The State of California Has Long Sponsored Its Vineyard and Wine Industry.

47. The police powers of the State have been invoked on seven different occasions since 1933 to direct and control the operations of the vineyard industry. Substantial quantities of the grapes grown in California may be used, alternatively, for marketing as

fresh fruit or for processing into either raisins or wine. Hence, the economic relationships between these three aspects of the vineyard industry are closely interrelated. From 40% to 60% of the California annual grape crop is processed into wine. The wine advertising and promotion program above mentioned has been in effect continuously since 1938. A comparable program of the State with regard to raisins has been in effect since 1949, with annual expenditures now in excess of $330,000.

48. Other substantial expenditures of public moneys of the State are made annually in research, the development of new and improved methods of viticulture and wine-making, extensive reporting and statistical services, and in enforcing health, sanitation and quality standards, all on behalf and in furtherance of the grape and vineyard industry, of which the wine industry is an inseparable part.

49. Such public interest and activity on the part of the State of California in the cultivation of grapes and the related wine industry is almost as old as state government in California. As early as 1859, the California Legislature exempted vineyards from taxation for a period of four years. When the vine disease of phylloxera was almost fatal to California vineyards in 1880, the State Board of Viticultural Commissioners was created. Ever since then the financial resources of the State derived from use of its taxing power and its police power have been utilized continuously to develop and promote the vineyard industry. The State financed and its University developed

the technique of grafting the European *vitis vinefera* upon the disease-resistant native vine stock which is the basis of the modern California industry. For many years last past the State has owned and operated an experimental vineyard and winery, valued at more than $500,000. Although operated and staffed by the University of California College of Agriculture, the practical results of its research and developmental work are more closely related to the work-a-day problems of an operating vineyard than to the educational curriculum of the University.

C. The Vineyard and Wine Industry Is Essential to the Economy of California.

50. California is the Nation's largest cultivator of grapes and its leading producer of wine. The yield from California vineyards exceeds that of all other states combined. In 1956 the estimated dollar value of the California grape production was $126 million out of a national total dollar value of $148 million. Agriculture is the dominant industry of the State, and grapes are the largest and most valuable of the crops grown for human consumption. Grapes are grown in 48 out of the 58 counties in the State. Bearing vineyards cover a total of 433,000 acres of land. There are about 2.8 million tons of grapes produced annually. The financial return to California farmers averaged more than 120 million dollars annually from 1950 through 1956. The output of the industry is approximately five times as great as those of the other 47 states combined, and the value of its properties enjoys a like preeminence. The value of Cali-

fornia vineyard and winery properties exceeds 500 million dollars. The industry furnishes direct employment to more than 100,000 persons.

51. During the last twenty years California has produced an annual average of about 85% of all wine, including foreign wine, commercially distributed and sold in the United States. During the past ten years California produced an annual average of about 115 million gallons of wine; all other states combined produced an annual average of about 16 million gallons. The value of the product of California wineries at the consumer level is about 500 million dollars per year.

52. Directly related to the production of California wine as a source of revenue to the community is a host of commercial, transportation and financial interests. In the aggregate, these related interests annually turn over in excess of 80 million dollars. In California alone there are about 35,000 business establishments engaged in the distribution and sale of wine. The economic interrelationships are such that the entire economy of the State of California is affected by the prosperity or depression of its wine industry.

D. Interstate Trade Barriers Against Wine Have Become a Matter of National Importance.

53. The great bulk of California wine, about 80%, is sold in other states of the Union. Since 1940 the resulting interstate commerce has been increasingly the subject of restraint and discriminatory legislation by other states which have erected trade barriers of

various kinds to protect local wine producers against the competition of California wineries. Such discriminatory legislation has been enacted in some 28 states and there is pressure in other states for the enactment of similar legislation. The legislative pattern includes discriminatory license fees, excise taxes and merchandising restrictions. At least two other states have already adopted the technique utilized by the State of Washington.

54. In May 1955, the California Legislature passed a concurrent resolution (Calif. Stats. 1955, ch. 214, a copy of which is annexed hereto as Exhibit C) asserting the comprehensive public interest of the State in the wine industry. It declared that unless trade barriers against wine were abated "great, lasting, and irreparable harm" would be done to the State of California. The resolution requested the Governor, the Director of the Department of Agriculture, and the Attorney General of the State to invoke the authority of their offices in their discretion "to the end that such discriminatory trade barriers be removed and eliminated so as to secure the free and unrestricted access of the wines of California to the national market; . . ." This complaint is filed in response to the foregoing resolution to discharge, in an appropriate manner, the duty and responsibility of the State arising from sections 1300.11(d) and 1300.15(b)(8) of the California Agricultural Code as implemented by its Wine Marketing Order.

VIII.

THE NEED FOR INVOKING THE ORIGINAL JURISDICTION OF THIS COURT.

55. Acting through its Governor, its Director of Agriculture, and its Wine Advisory Board, for many years the State of California has sought to persuade officials of the State of Washington to take appropriate action to end the discriminations and trade barriers against California wine created by the laws and official acts of that state. The only result of such efforts to obtain an amicable settlement of this controversy has been a measure of success in forestalling increased discriminations and additional trade barriers. None of the statutes, regulations and official acts of the State of Washington herein complained of have been modified to eliminate or even lessen their discriminatory and adverse treatment of California wine transported into the State of Washington.

56. Adequate and proper relief cannot, in the circumstances of this case, be obtained by suit against any particular agency or official of the State of Washington. The Washington statute commands all county and municipal peace officers throughout the State, as well as designated officials of state government, to enforce and prosecute violations of the statutes and regulations herein complained of (Rev. Code Wash. § 66.44.030).

57. There is no private litigation pending which involves the issues raised herein.

58. Plaintiff is without any plain, adequate or speedy remedy at law, is suffering and will continue

to suffer irreparable injury, and can be fully protected in the enjoyment of its rights only by the decrees and orders of this Court.

Wherefore, Plaintiff prays:

(a) That the State of Washington and all persons purporting to act pursuant to and by virtue of its authority be perpetually restrained and enjoined from enforcing any of its said discriminatory and unconstitutional statutes, regulations and other official acts.

(b) For such other and further relief as this Court may deem just and equitable.

Dated, February 11, 1958.

EDMUND G. BROWN,
Attorney General of the State of California,
WALLACE HOWLAND,
Assistant Attorney General of the State of California,
LEONARD M. SPERRY, JR.,
Deputy Attorney General of the State of California,
Attorneys for Plaintiff.

(Appendices A, B, C and D Follow.)

Appendix A

TEXT OF PERTINENT STATUTES AND REGULATIONS OF THE STATE OF WASHINGTON.

Statutes

The following Sections of the Revised Code of Washington are relevant to this proceeding:

66.04.110 "Domestic winery." "Domestic winery" means a place where wines are manufactured or produced within the state from fruits or fruit products all of which were grown within the state.

66.04.120 "Domestic wines." "Domestic wines" means wines manufactured or produced within the state in a licensed domestic winery.

66.04.360 "Wine." "Wine" means any alcoholic beverage obtained by fermentation of fruit (grapes, berries, apples, etc.) or other agricultural product containing sugar, to which any saccharine substances may have been added before, during, or after fermentation, and containing not more than seventeen percent of alcohol by weight, including sweet wines fortified with wine spirits, such as port, sherry, muscatel, and angelica.

66.04.370 "Wine wholesaler." "Wine wholesaler" means a person who buys wine from a vinter or winery located either within or beyond the boundaries of the state for the purpose of selling it as permitted by this title, or who represents such vinter or winery as agent.

66.08.020 Liquor control board to administer. The administration of this title, including the general control, management, and supervision of all state liquor stores, is vested in the liquor control board.

66.08.030 Regulations. For the purpose of carrying into effect the provisions of this title according to their true intent, or of supplying any deficiency therein, the board may make such regulations not inconsistent with the spirit of this title as are deemed necessary or advisable. All regulations so made shall be a public record and filed in the office of the secretary of state, and together with a copy of the law as contained in this title shall forthwith be published in pamphlets, which pamphlets shall be distributed free at all liquor stores and as otherwise directed by the board. When so filed and published they shall have the force and effect of statute.

66.08.050 Powers of board in general. The board, subject to the provisions of this title and the regulations, shall

. . .

(5) determine the nature, form, and capacity of all packages to be used for containing liquor kept for sale;

. . .

66.08.060 Board cannot advertise liquor. The board shall not advertise liquor in any form or through any medium whatsoever. The board may adopt any and all reasonable regulations as to the kind, character, and location of liquor advertising.

66.16.010 Board may establish—Standard as to prices. There shall be established at such places throughout the state as the board deems advisable, stores to be known as "state liquor stores," for the sale of liquor in accordance with the provisions of this title and the regulations.

The prices of all liquor shall be fixed by the board from time to time so that the net annual

revenue received by the board therefrom shall not exceed thirty-five percent.

66.24.210 Domestic wines may be sold direct to retail licensees. All wines manufactured or produced in domestic wineries may be sold by the manufacturer or producer thereof direct to persons holding licenses entitling them to sell wine at retail under the provisions of this title, or to licensed domestic wine wholesalers, or to licensed domestic wineries.

No wines except domestic wines shall be sold within the state except to the liquor control board or by the board through the state liquor stores.

66.24.370 Wine retailer's license—Class F. There shall be a wine retailer's license to be designated as class F license to sell wine in bottles and original packages, not to be consumed on the premises where sold, at any store other than state liquor stores. Such licensee shall pay to the state liquor stores for such wines the current retail price. The fee shall be thirty-five dollars per year. The holder of a class A or a class B license shall be entitled to the privileges permitted in this section by paying an annual fee of ten dollars for each store.

66.24.410 Terms defined for class H license purposes. (1) "Spirituous liquor," as used in RCW 66.24.400 to 66.24.470, inclusive, means "liquor" as defined in RCW 66.04.200, except "wine" and "beer" sold as such.

. . .

66.24.440 Purchase of liquor by class H licensees. Each class H licensee shall be entitled to purchase any spirituous liquor items saleable under such class H license from the board at a

discount of not less than fifteen percent from the retail price fixed by the board, together with all taxes.

66.28.050 Solicitation of orders prohibited—Exceptions. No person shall canvass for, solicit, receive, or take orders for the purchase or sale of any liquor, or act as agent for the purchase or sale of liquor, but this shall not apply to agents dealing with the board, or to the receipt or transmission of a telegram or letter by any telegraph agent or operator or post office employee in the ordinary course of his employment as such agent, operator, or employee.

Nothing in this title shall prevent any wholesaler, by his or its authorized agent, from soliciting orders from holders of licenses entitling them to sell beer; nor prevent any domestic winery, domestic wine wholesalers or their proprietors, agents, and employees from soliciting orders of persons holding licenses entitling them to sell wine at retail.

66.44.030 Local officers to enforce title. All county and municipal peace officers are hereby charged with the duty of investigating and prosecuting all violations of the laws and regulations relating to the manufacture, importation, transportation, possession, distribution, and sale of liquor. . . .

Regulations

The following Revised Rules and Regulations (Wash. State Printing Plant, 1956) duly adopted and promulgated by the Washington State Liquor Control Board pursuant to the foregoing statutes are pertinent to this proceeding:

(32) Records—Purchases—Reports

. . .

(d) No retail licensee shall purchase wine except from state liquor stores or from a duly licensed domestic wine wholesaler or a duly licensed domestic winery. No domestic wine shall be purchased from a domestic winery or a domestic wine wholesaler at a price differing from the price for the container of wine as shown in the price posting filed in accordance with section (81) of the regulations. No retail licensee may return wine to a wine wholesaler or to a domestic winery except in accordance with the provisions of section (83) of the regulations.

(66) Containers—Sizes and Types Permitted

All domestic wine sold by a domestic winery for consumption in the state shall be sold in bottles or glass containers of the following sizes: One-tenth gallon, one-eighth gallon, one-fifth gallon, one-fourth gallon, one-half gallon, and one gallon; and also in 12-oz. and 24-oz. round bottles.

No domestic winery or domestic wine wholesaler shall, without permission of the board, adopt or use any packages for wine differing in sizes and capacities from the following classification, to-wit: 24 1/10 gal., 12 1/10 gal., 24 1/8 gal., 12 1/8 gal., 12 1/5 gal., 12 1/4 gal., 6 1/2 gal., and 4 1 gal.; and also 24 12-oz., 12 12-oz., and 12 24-oz. round bottles.

For taxing purposes and in all reports to the board, the above enumerated designations of package sizes, and no others, shall be used.

(81) Wine Price Posting

Every domestic winery shall file with the board at its office in Olympia a "wine price posting"

showing the delivered prices at which any and all brands of wine offered for sale by such domestic winery shall be sold within the state, which prices shall be uniform for all retailers within the state. All price postings shall be made upon forms prescribed and furnished by the board and shall set forth:

(a) All brands, types and sizes of bottles or glass containers of wine offered for sale by such domestic winery, which bottles or glass containers shall be limited to the sizes permitted in Regulation (66).

(b) The delivered sale prices thereof within the state, including allowances, if any, for returned empty bottles or glass containers.

No domestic winery nor domestic wine wholesaler shall sell or offer for sale any bottle or glass container of domestic wine at a price differing from the price of such bottle or glass container of domestic wine as shown in the price posting then in effect filed by the domestic winery whose label appears on such bottle or glass container.

No price posting shall become effective until ten days after the actual filing thereof with the board. In the event a price posting is filed before a previous one has become effective, the subsequent filing shall nullify said previous price posting.

No price posting involving quantity discounts shall be made.

All price postings filed as required by this regulation shall at all times be open to inspection to all trade buyers within the State of Washing-

ton and shall not in any sense be considered confidential.

Any provision of this regulation may by order of the board be suspended or modified without notice to meet emergencies.

(113) Salesman—Prohibited Practices—Penalties.

. . .

(d) No manufacturer, wholesaler or distributor of liquor, or salesman, agent or representative thereof, except the authorized agent of a licensed beer wholesaler, brewery or beer importer, or of a licensed domestic winery or domestic wine wholesaler, shall, directly or indirectly, by mail or otherwise, contact or solicit any retail licensee or any employee thereof for the purpose of promoting or inducing the sale of any liquor whatsoever nor grant, allow, pay or rebate, directly or indirectly, any cash or merchandise to any licensee to induce or promote the sale of liquor, including the payment of tips to licensees or their employees and the purchasing of drinks "for the house."

(e) Upon the infraction of any of the foregoing regulations by any salesman, agent or representative, the board may cancel the credentials issued to such salesman, agent or representative and may remove his company's products from the sales list of the board.

Appendix B

BUDGET—CALIFORNIA WINE MARKETING ORDER AS AMENDED, 1957-1958 MARKETING SEASON.

BUDGET

Wine Marketing Order as Amended 1957-1958 Marketing Season July 1, 1957 through June 30, 1958

Estimated Income:	Expense	Advertising	Total
Carry Over From 1956-1957 Marketing Season		803,206.00	803,206.00
Estimated Collections July 1, 1957 Through June 30, 1958 (Based on 120,000,000 Gallons)	154,809.00	1,945,191.00	2,100,000.00
Total Estimated Cash July 1, 1957 Through June 30, 1958	154,809.00	2,748,397.00	2,903,206.00
Less One Month Deferred Collections		171,542.00	171,542.00
Estimated Cash Available July 1, 1957 Through June 30, 1958	154,809.00	2,576,855.00	2,731,664.00

A/C#	Budget Allotments for Salaries & Wages	Administration	Advertising			
1.1	Clerical & Office	27,040.00	[illegible]			
1.2	Field Enforcement Representatives	13,860.00				
1.5	Field Service Representatives		157,000.00			
1.6	Administration	13,200.00				
	Total Salaries & Wages	54,100.00	208,265.00	54,100.00	208,265.00	262,365.00
	Materials & Supplies					
2.1	Clerical & Office and Advertising	2,174.00	41,000.00	2,174.00	41,000.00	43,174.00
	Service & Expense					
3.1	Miscellaneous	9,206.00	35,988.00			
3.1F	Research, Market Survey, Publicity & Educational Program	61,829.00	678,671.00			

3.1G	Medical Research		69,500.00			
3.1J	Viticultural & Oenological Research		6,000.00			
3.5	Freight, Cartage & Express	100.00	15,000.00			
3.6	Postage	500.00	14,600.00			
3.9A	Travel, Office, Field Enforcement, Board Members	4,800.00	2,000.00			
3.9E	Travel: Field Service		35,000.00			
3.9M	Travel: Mileage	1,000.00	35,000.00			
3.10	Automobile Expense	1,500.00				
3.29	Advertising Agency		980,000.00			
3.39	Production & Distribution of Wine Films		80,000.00			
3.40	Charges to Prior Years	100.00	100.00			
3.45	Wine & Allied Industries Conventions & Fairs		10,000.00			
3.48	Consumer Taste Preference Research		20,000.00			
3.53	Trade Barrier Special Litigation		20,037.00			
3.54	Grape Crop Surveys		15,000.00			
3.55	Wine Quality Research		25,000.00			
3.56	Bulk Aging Research		10,000.00			
3.57	Technical Translations		600.00			
3.20	Departmental Administrative Expense	7,000.00				
3.21	Bureau of Markets	7,500.00				
3.26	Pro-Rata: Attorney General	3,000.00				
	Total Service & Expense	96,535.00	2,052,496.00	96,535.00	2,052,496.00	2,149,031.00
	Property & Equipment					
4.1	Administrative & Advertising	2,000.00	2,982.00	2,000.00	2,982.00	4,982.00
	Total Expenses	154,809.00	2,304,743.00	154,809.00	2,304,743.00	2,459,552.00
	Reserve for Contingencies				272,112.00	272,112.00
				154,809.00	2,576,855.00	2,731,664.00

Appendix C

CALIFORNIA SENATE CONCURRENT RESOLUTION NO. 98—RELATIVE TO DISCRIMINATORY TRADE BARRIERS.

California Statutes 1955, Chapter 214

[Filed with Secretary of State, June 8, 1955.]

WHEREAS, It has been the public policy of the State of California, ever since its admission to the Union in 1850 to stimulate and encourage the fullest development of its resources, to promote its agriculture and commerce and to secure to its people a high standard of life; and

WHEREAS, The soil and climate of the State are more hospitable than any other area the world over to the growing of grapes of all types and varieties for domestic use, for unfermented juice, for conversion into raisins and for processing into a wide spectrum of wines for appetizer, table and dessert use, and there has been a sound and continuous growth of the wine industry in the State of California; and

WHEREAS, The area upon which grapes of different kinds are now grown covers an area of approximately 458,900 bearing acres of vineyards in 47 of the 58 counties of the State of California, being more than one-third of all the acreage in the State of California planted to fruits and nuts, and the State of California being the largest fruit-growing state in the United States of America; and

WHEREAS, Grapes have a farm value in excess of 107 million dollars, and the annual return from

grapes to the farmers of the State of California is in excess of 130 million dollars; and

WHEREAS, From 40 percent to 60 percent of the annual grape crop of the State of California is used for wine and in 1952, of a total grape crop of 2,967,000 tons, more than 1,201,000 tons were crushed for wine, and in the year 1953, of a total grape crop in excess of 2,400,000 tons, more than a million tons were crushed for wine; and

WHEREAS, The grape and wine industry in the State of California represents taxable property of a value in excess of 500 million dollars, in addition to the taxes paid to the State of California and various counties on wine inventories; and

WHEREAS, The California grape and wine industry affords year-round employment to more than 111,000 persons receiving annual wages of approximately 157 million dollars; and

WHEREAS, The wine industry is enmeshed into the economy of the State of California and directly or indirectly is a source of revenue to a host of commercial, transportation and financial interests in an annual amount in excess of 80 million dollars, and the whole economy of the State of California is affected by the prosperity or depression of the wine industry; and

WHEREAS, From the time since California became a state it has introduced new types of vines from Europe, developed insecticides, engaged in experimental work to promote the health of growing

plants, created new varieties and types of vines, provided information to growers of grapes and vintners and created a system of orderly marketing and directly concerned itself with promoting the industry, with the result that a number of agencies of the State Government, including the Department of Agriculture, the University of California and the Agricultural College at Davis are engaged in activities to aid in its development and progress; and

WHEREAS, A number of states of the Union have employed statutes of their legislatures to set up trade barriers to the end of abridging or prohibiting the entrance of California wines into their markets; and

WHEREAS, The convention which drew up the Constitution of the United States was called for the very purpose of eliminating the trade barriers set up between the several states, the Constitution itself through numerous provisions in that instrument seeks to make of the continental United States a single free trade zone, and to assure to the products of every lawful industry access to the national market; and

WHEREAS, Unless the power of a state in the Union to set up trade barriers against commodities produced in other states is decreed to be unlawful, acts of the states in setting up trade barriers threaten seriously to impair the integrity of the national economy to the detriment of the State and people of California; and

WHEREAS, The State of California, as a sovereign and as Parens Patriae, has over the decades

formulated a public policy for the promotion of its agriculture and the welfare of its people, and trade barriers such as those mentioned above threaten to drive a wedge between this policy and the results which naturally may be expected to flow from it; and

WHEREAS, The persons and interest which are adversely affected by trade barriers set up by several states are more comprehensive than the parties whose stakes in the industry are so direct and immediate that they have causes of action of their own; and

WHEREAS, The interest of the State of California as sovereign and as Parens Patriae is more comprehensive than the interest of private parties which have a stake in the wine industry, and the interest of the State is of a different character from that of the individuals who are immediately concerned; and

WHEREAS, Unless relief is given from the trade barriers set up by several states, and unless the power of the states to set up such trade barriers is abated, great, lasting and irreparable harm will be done to the State of California and to its residents; now, therefore be it

Resolved by the Senate of the State of California the Assembly thereof concurring, That the grape and wine industry of the State of California is an essential and integral part of the economy of the State of California and is affected with the public interest; and be it further

Resolved, That the Legislature of the State of California hereby respectfully requests that the Governor

of the State of California, the Director of the Department of Agriculture and the Attorney General of the State of California direct their attention to the problem of discriminatory trade barriers against California wines wherever the same exist, and, in the exercise of their sound discretion invoke the authority of their respective offices to the end that such discriminatory trade barriers be removed and eliminated so as to secure the free and unrestricted access of the wines of California to the national market; and be it further

Resolved, That the Secretary of the Senate be directed to transmit copies of this resolution to the Governor of the State of California, the Director of Agriculture, and the Attorney General of the State of California.

Appendix D

TEXT OF PERTINENT PROVISIONS OF CALIFORNIA AGRICULTURAL CODE AND EXCERPT FROM WINE MARKETING ORDER.

The following Sections of the California Agricultural Code are pertinent to this proceeding:

> **21 Director: Appointment and tenure: Salary: Bond.** The department shall be conducted by an executive officer known as the Director of Agriculture. The director shall be appointed by and hold office at the pleasure of the Governor . . .

The following Sections are provisions of the California Marketing Act of 1937 (Calif. Stats., 1937, C. 404, § 1, p. 1329, effective June 15, 1937), as amended:

> **1300.10 Legislative declarations.** (a) It is hereby declared that the marketing of agricultural commodities in this State in excess of reasonable and normal market demands therefor; disorderly marketing of such commodities; improper preparation for market and lack of uniform grading and classification of agricultural commodities; unfair methods of competition in the marketing of such commodities; and the inability of individual producers to maintain present markets or to develop new or larger markets for California grown agricultural commodities, results in an unreasonable and unnecessary economic waste of the agricultural wealth of this State. Such conditions and the accompanying waste jeopardize the future continued production of adequate food supplies for the people of this and other States, and prevent agricultural

producers from obtaining a fair return from their labor, their farms and the agricultural commodities which they produce. As a consequence, the purchasing power of such producers has been in the past, and may continue to be in the future, unless such conditions are remedied, low in relation to that of persons engaged in other gainful occupations within this State. Agricultural producers are thereby prevented from maintaining a proper standard of living and from contributing their fair share to the support of the necessary governmental and educational functions, thus tending to increase unfairly the tax burdens of other citizens of this State.

(b) These conditions vitally concern the health, peace, safety and general welfare of the people of this State. It is hereby declared to be the policy of this State to aid agricultural producers in preventing economic waste in the marketing of their agricultural commodities, to develop more efficient and equitable methods in the marketing of agricultural commodities and to aid agricultural producers in restoring and maintaining their purchasing power at a more adequate, equitable and reasonable level.

(c) The marketing of agricultural commodities within this State is hereby declared to be affected with a public interest. The provisions of this chapter are enacted in the exercise of the police powers of this State for the purpose of protecting the health, peace, safety and general welfare of the people of this State.

1300.11 Purposes of chapter. The purposes of this chapter are:

. . .

(d) To provide methods and means for the maintenance of present markets or for the development of new or larger markets for agricultural commodities grown within this State or for the prevention, modification or elimination of trade barriers which obstruct the free flow of such agricultural commodities to market.

. . .

1300.12 Definitions.

. . .

(c) "Agricultural commodity" means any and all agricultural, horticultural (including floricultural), viticultural (including wine) and vegetable products produced in this State, or any class, variety or utilization thereof, either in their natural state or as processed by a producer for the purpose of marketing such product or by a processor as herein defined, and including bees and honey and manufacturing milk as such milk is defined in Section 452, Chapter 2, Division 4 of this code, but not including timber or timber products.

. . .

1300.12a Purpose of 1941 amendment of § 1300.12: Orders and acts confirmed.

The legislature hereby declares that the addition of the phrase "(including wine)" in subdivision (c) of Section 1300.12 is made for the purpose of clarification only and is in no wise to be construed or interpreted as an indication that wine is not an agricultural commodity as defined in that subdivision as originally enacted in Chapter 404, Statutes of 1937, and as heretofore amended. The Legislature hereby further declares that at the time of the original enact-

ment of said subdivision (c) and at all times since, it intended that wine be, and wine was, included within the definition of the term "agricultural commodity."

. . .

1300.13 Administration and enforcement of Act: Powers of director: Marketing orders and agreements. (a) The Director of Agriculture shall administer and enforce the provisions of this act and shall have and may exercise any or all of the administrative powers conferred by Sections 11180 to 11191, inclusive, of the Government Code upon the head of a department of the State. In order to effectuate the declared purposes of this act, the Director of Agriculture is hereby authorized to issue, administer and enforce the provisions of marketing orders hereunder regulating producer marketing or the handling of agricultural commodities within this State.

. . .

1300.15 Advisory board: Optional provisions of marketing order.

(a) (1) Any marketing order issued pursuant to this chapter shall provide for the establishment of an advisory board to assist the director in the administration of any marketing order. The members of the board shall be appointed by the director and may hold office at the pleasure of the director. . . .

(2) . . . The director may authorize such board: . . . to incur such expenses, to be paid by the director from moneys collected as herein provided, as the director may deem necessary and proper to enable such board properly to perform

such of its duties as are authorized herein. The duties of any such board shall be administrative only and may include only the following:

a. Subject to the approval of the director to administer such marketing order.

. . .

(b) Subject to the legislative restrictions and limitations set forth herein any marketing order issued by the director pursuant to this chapter may contain any or all of the following provisions for regulating or providing methods for regulating producer marketing or the handling or any of the operations of processing or distributing by handlers of any agricultural commodity within this State, but no others:

. . .

(8) Provisions for the establishment of plans for advertising and sales promotion to maintain present markets or to create new or larger markets for agricultural commodities grown in the State of California, or for the prevention, modification or removal of trade barriers which obstruct the free flow of agricultural commodities to market. The director is hereby authorized to prepare, issue, administer and enforce plans for promoting the sale of any agricultural commodity.

Provided, that any such plan shall be directed toward increasing the sale of such commodity without reference to a particular brand or trade name, and

Provided further, that no advertising or sales promotion program shall be issued by the director which shall make use of false or unwarranted claims in behalf of any such product, or dis-

parage the quality, value, sale or use of any other agricultural commodity.

1300.17 Assessments: Collection and disbursement: Investment or reinvestment of moneys deposited.

. . .

(b) Each marketing order which authorizes carrying out advertising and sales promotion plans shall provide for the levying and collection of assessments in sufficient amounts to defray the expenses of such activities. Each such marketing order shall indicate the maximum rate of any such assessment and the proportion, if any, payable by each producer and handler directly regulated or affected by such marketing order. The advisory board appointed by the director to assist the director in administering each marketing order shall recommend to the director, from time to time, budgets to cover such expenses and the assessment rate necessary to provide sufficient funds. If the director finds that each such budget and assessment rate are proper and equitable and will provide sufficient moneys to defray such expenses he may approve such budget and approve and levy such assessment. Any assessment so established shall be based upon the units in which such agricultural commodity is marketed or upon any other uniform basis which the director determines to be proper and equitable. Any assessment rates established hereunder shall be in amounts not to exceed four per cent (4%) of the gross dollar volume of sales by all producers or by all processors, distributors or other handlers of such agricultural commodity regulated by such marketing order during the

marketing season or seasons during which such marketing order is effective.

. . .

(f) Any moneys collected by the director pursuant to this act shall be deposited in a bank or banks, or other depository approved by the Director of Finance, allocated to each marketing order under which they are collected, and disbursed by the director only for the necessary expenses incurred by the advisory board and the director and approved by the director with respect to each such separate marketing order. Funds so collected shall be deposited and disbursed in conformity with appropriate rules and regulations prescribed by the director. The expenditure of such funds shall be exempt from the provisions of Section 16003 of the Government Code. All such expenditures by the director shall be audited at least annually by the Department of Finance and a copy of such audit shall be delivered within 30 days after the completion thereof to the Governor, the Director of Agriculture and the Controller. Any moneys in the State Treasury to the credit of the "State Marketing Act Trust Fund" shall be withdrawn and deposited in accordance with the provisions of this paragraph.

. . .

1300.19 Responsibility for administration of act: Penalties, remedies, procedures and actions: Authority of inspector: Disposition of lot failing to comply with marketing order requirements.

The Director of Agriculture shall be responsible for the administration and enforcement of this chapter.

The following penalties, remedies, procedures and actions shall apply in instances of violations and complaints of violations of the provisions of this chapter or of any marketing order or the rules and regulations issued by the director under the authority of this chapter or any marketing order issued and effective thereunder:

(a) Every person who violates any provision of this chapter or any provision of any marketing order duly issued by the director hereunder, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than fifty dollars ($50), nor more than five hundred dollars ($500), or by imprisonment of not less than 10 days nor more than six months, or by both such fine and imprisonment. Each violation during any day shall constitute a separate offense.

. . .

The following is the full text of Article III, Section A, of the "California Marketing Order for Wine, as Amended—Effective July 1, 1957", approved by the California Director of Agriculture, June 4, 1957:

Advertising and Sales Promotion. There shall be established plans for advertising and sales promotion to maintain present markets or to create new or larger markets for wine produced in the State of California. Such plans may consist, insofar as funds are available, and as the Board may recommend and the Director approve, of programs of advertising, dealer service, trade promotion, publicity, market development and expansion activities for the prevention, modification or elimination of trade barriers

which restrict the free flow of wine produced in California to market, including the presentation of facts to and negotiations with State, Federal or foreign governmental agencies on matters which affect the marketing of wine produced in this State; also such other plans as may be recommended by the Board and approved by the Director pursuant to this Marketing Order, as Amended; *provided,* that any such plans shall be directed toward increasing the sale of such wine without reference to any particular private brand or trade name; and *provided, further,* that no advertising or sales promotion program shall be issued which shall make use of false or unwarranted claims in behalf of wine, or disparage the quality, value, sale or use of any other agricultural commodity.

Certificate of Service

The undersigned, a member of the bar of the Supreme Court of the United States, and one of the counsel of record for the plaintiff, hereby certifies:

That on the 11th day of February, 1958, he served the within and foregoing "Motion for Leave to File a Complaint" and attached "Complaint" upon the State of Washington, the defendant, as prescribed by Rules 9 and 33 (par. 3(b)) of said Court:

He deposited at the post office at San Francisco, California, two copies of the said Motion and Complaint, securely enclosed in an envelope, air mail postage prepaid, addressed to each of the following officials of said defendant State at his post office address, as shown below:

Honorable Albert D. Rosellini,
Governor of the State of Washington,
State Capitol,
Olympia, Washington.

Honorable John J. O'Connell,
Attorney General of the State of Washington,
State Capitol,
Olympia, Washington.

Edmund G. Brown.

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SUPREME COURT. U. S.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 12, Original

STATE OF CALIFORNIA, *Plaintiff,*

v.

STATE OF WASHINGTON, *Defendant.*

BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF MOTION FOR LEAVE TO FILE A COMPLAINT.

EDMUND G. BROWN,
Attorney General of the State of California,
WALLACE HOWLAND,
Assistant Attorney General of the State of California,
LEONARD M. SPERRY, JR.,
Deputy Attorney General of the State of California,
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. , Original

STATE OF CALIFORNIA,
Plaintiff,

v.

STATE OF WASHINGTON,
Defendant.

BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF MOTION FOR LEAVE TO FILE A COMPLAINT.

By a Motion for Leave to File a Complaint, the State of California seeks to invoke the original jurisdiction of this Court in an action against the State of Washington. This brief is tendered in support of the motion.

JURISDICTION.

The parties to this proceeding are both states of the United States of America. Jurisdiction to hear

this case as an original proceeding in the Supreme Court of the United States is conferred by Article III, Section 2, Clause 2, of the United States Constitution. Further, the jurisdiction of this Court has been declared to be exclusive and the United States District Courts have been denied jurisdiction over controversies between two or more states by the terms of Title 28, Section 1251(a)(1) of the United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Article I, Section 8, Clause 3, of the United States Constitution:

> "The Congress shall have Power
>
> ". . .
>
> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

Article III, Section 2, Clause 1:

> "The judicial Power shall extend . . . to Controversies between two or more States; . . ."

Article III, Section 2, Clause 2:

> "In all Cases affecting ambassadors other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. . . ."

Article IV, Section 2, Clause 1:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Twenty-first Amendment, Section 2:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Title 28, Section 1251(a)(1), United States Code, 62 Stat. 927:

> "(a) The Supreme Court shall have original and exclusive jurisdiction of:
>
> "(1) All controversies between two or more States;"

The following numbered sections of the Revised Code of Washington, Title 66, comprising provisions of the Washington State Liquor Act: 66.04.110; 66.04.120; 66.04.360; 66.04.370; 66.08.020; 66.08.030; 66.08.050(5); 66.08.060; 66.16.010; 66.24.210; 66.24.370; 66.24.410; 66.24.440; 66.28.050; 66.44.030.

The following numbered Revised Rules and Regulations of the Washington State Liquor Control Board (Wash. State Printing Plant, 1956): Nos. 32(d), 66, 81, 113(d) and (e).

The provisions of these statutes and regulations of the State of Washington are lengthy. They are set forth in Appendix A to the Complaint herein.

The following numbered sections of the California Agricultural Code, all but Section 21 being provisions of the California Marketing Act of 1937: 21; 1300.10; 1300.11(d); 1300.12(c); 1300.12a; 1300.13(a); 1300.15(a); 1300.15(b)(8); 1300.17(b); 1300.17(f); 1300.19

(a). These provisions are lengthy. They are set forth in Appendix D to the Complaint herein.

QUESTIONS PRESENTED.

The Motion for Leave to File a Complaint raises the following issues:

1. Does the State of California have standing to sue and is it the real party in interest herein?

2. Is the State of Washington properly the defendant?

3. Is this Court the only proper forum for this case?

4. Do the substantive questions presented by the Complaint disclose a justiciable controversy between two states?

STATEMENT OF THE CASE PRESENTED BY THE COMPLAINT.

A summary statement of this case is set forth in paragraphs 1-5 of the Complaint. It is hereby incorporated herein by reference.

SUMMARY OF ARGUMENT.

I. This controversy arises out of conflict between the policies of the states of California and Washington, as embodied in their respective statutes. Washington has erected trade barriers against California

wine to provide economic protection to its own wine industry. Since 1938, California has used the facilities of its state government actively to promote the sale of California wine in lawful markets throughout the nation. To protect the "quasi-sovereign" rights inuring to it as a state which have been violated and injured by official acts of the State of Washington, California asserts her standing to sue herein on three grounds:

A. Under California law, the functions of the State and of private industry in the marketing of California wine are inseparable. The sales promotion activities of the State itself presently require expenditures of State funds at the rate of over $2,700,000 per year. About 80% of these activities are carried on outside of California. In every state where it is lawful to do so, State personnel work directly with wine wholesalers, training their salesmen and furnishing them with sales aids, merchandising displays and sales promotion literature intended for consumer use. These are in turn disseminated to wine retailers by the wholesalers. The State's activities lead directly to, and are a part of, negotiations for actual sales of California wine in interstate commerce. These State activities are entitled to the protection of the Commerce Clause against the unconstitutional discriminations practiced by Washington. In operation, these discriminations effectively preclude California from carrying on in Washington any of these sales promotion activities. California is not a mere volunteer; the need to protect its own functions and programs, assigned to it by law, give it standing to sue.

B. California has been assigned by its people the responsibility and duty of removing existing trade barriers against California wine. Obligated to discharge a responsibility properly entrusted to it by its people, it has the authority, correlative with that responsibility, to take appropriate action to protect the interests, tangible or intangible, so entrusted to its care. California's responsibility to take appropriate action concerning trade barriers arises from two sources, one, specific, the other, more general.

1. The California Marketing Act of 1937 (Calif. Agric. Code, § 1300.10, *et seq.*) declares that the marketing of California wine is affected with a public interest. It invokes the police powers of the State to provide both means and methods to prevent, modify or eliminate trade barriers which obstruct the free movement of California wine to market. This statutory purpose has been applied to the marketing of wine ever since 1938 by a State Wine Marketing Order. Having tried for many years, without success, to obtain the removal of the Washington trade barriers by amicable means, California has no other recourse but to invoke the original jurisdiction of this Court in this action.

2. California has also the responsibility of protecting its economy against unwarranted discriminations and of securing the general welfare and prosperity of its people. The Court's decisions in such cases indicate that the *quantum* of such injury is not as important in determining a state's standing to sue as the *nature* of the injury suffered (see

Georgia v. Pennsylvania R. R. Co., 324 U.S. 439, at 450-451). California's Complaint herein meets the established standards. The nature of the injury inflicted by Washington is of the utmost gravity. Washington has monopolized the distribution of California wine, fixed its prices at non-competitively high levels, and suppressed the promotion of its sale, but permits the marketing of Washington wine free of such economic strangulation. With agriculture the biggest industry in California, grapes are the largest and most valuable of all crops grown for human consumption. California production is five times as great as that of the other 47 states combined, producing $126,000,000 a year cash farm income in 1956 out of a national farm income from grapes of $148,000,000. California wine production is commensurate with that of its vineyards. The annual wine output is worth about $500,000,000 per year at the consumer level. The many years of direct and substantial assistance which California has given to its wine industry has given the State an interest therein which is more comprehensive and of a different character from that of the private parties connected with that industry.

II. The thrust of the complaint herein is solely at official acts of the State of Washington. These are: (1) Duly-enacted statutes, (2) properly-authorized rules and regulations of the Washington State Liquor Control Board, and (3) administrative actions of that Board acting within its statutory authority.

III. The original jurisdiction of this Court is the only proper forum for this controversy between two

states. Congress has made the jurisdiction of this Court exclusive in such cases (28 U.S.C., §1251(a)(1)). A suit between two states is, therefore, in a different category from cases wherein a state seeks to sue private parties. In the latter case there may be concurrent jurisdiction in the lower federal courts (see *Ames v. Kansas,* 111 U.S. 449). Further, there is no private litigation pending which involves the issues raised herein (*cf. Wisconsin v. Tennessee,* 350 U.S. 955).

IV. Bearing on the existence of a justiciable controversy herein are the substantive questions presented by the Complaint.

A. These questions are postulated upon the premise that Washington has granted to producers of Washington wine certain privileges with respect to its distribution and sale in that state. These are: (1) the privilege of distributing their wine, either directly or through privately-owned wholesalers of their own selection, to some 4,800 retail licensees, (2) the privilege of determining the prices at which their Washington wines shall be sold to retail licensees, and (3) the privilege of actively soliciting and promoting the sale of their Washington wine by direct contact with retail licensees and otherwise. The issue of substance raised by this case is whether, in such circumstances, Washington can then prescribe an entirely different economic system for the distribution and sale of California wine in that state by (1) subjecting its distribution to the monopoly control of the state, (2) using that state monopoly control to

fix prices for its sale at levels which make is non-competitive with Washington wine, and (3) denying to its producers in California the right either to solicit or promote its sale by direct contact with retail licensees in Washington. The two systems of distribution are thus the converse of each other.

B. The pivotal fact is that Washington does not prohibit its 4,800 retail licensees from selling, nor its citizens from buying and consuming California wine. At the critical point of supply to the consumer, Washington makes no classification and asserts no restriction based upon the origin of wine. The discriminations against California wine at the distributive level are not, therefore, in aid of a legitimate control of the liquor traffic. Their objective is not prohibition, not temperance, but economic localism.

C. It is California's position that the discriminations practiced by Washington violate both the Privileges and Immunities Clause of Article IV, Section 2, and the Commerce Clause, and are neither authorized nor justified by the Twenty-first Amendment.

1. About 60% of the 261 producers of California wine are individual citizens of California. By virtue of Article IV, Section 2, they are entitled to whatever privileges of trade and commerce Washington has granted to its own citizens. The privileges that Washington has seen fit to grant to its own citizens in distributing, marketing, pricing and promoting the sale of wine produced by them in Washington, "neither more nor less, shall be the measure of the rights of citizens of other states" (*The Slaughterhouse*

Cases, 83 U.S. 36, 77; *Ward v. Maryland,* 12 Wall. 418). The discriminations against California wine involve the denial to California citizens of trade privileges granted by Washington to its own citizens. Hence, they violate the Privileges and Immunities Clause of Article IV, Section 2.

2. Washington also violates the Commerce Clause (*Baldwin v. Seelig,* 294 U.S. 511) in a manner not sanctioned by the Twenty-first Amendment. Dual and discriminatory marketing systems were not involved in any of the Court's prior decisions construing the Commerce Clause in the light of the Amendment. In *State Board of Equalization v. Young's Market,* 299 U.S. 59, 62, the Court found that "The case does not present a question of discrimination prohibited by the commerce clause". *Mahoney v. Joseph Triner Corp.,* 304 U.S. 401, which did involve a form of discrimination against interstate commerce, was considered solely as an equal protection case under the Fourteenth Amendment; consideration of the Commerce Clause was not involved. The unique facts of this case make it unnecessary to ask the Court to overrule any of its prior decisions construing the Twenty-first Amendment. The Amendment adopted the phraseology of the Webb-Kenyon Act (27 U.S.C. § 1) which had previously been construed as not authorizing discrimination of the type here involved (e.g., *Brennan v. Southern Express Co.,* 106 S.C. 102, 90 S.E. 402). The purpose of the Amendment was to elevate to constitutional status the policy as well as the provisions of the antecedent Webb-Kenyon Act. Since

the Amendment is in derogation of the principle of national economic unity which pervades so many of the other provisions of the Constitution, its construction should be limited to its specific purpose. It does not wholly nullify the Commerce Clause as a limitation upon state power (*Young's Market,* supra, 299 U.S. at 64). A presently undefined residual limitation remains, after giving full effect to the intendment of the Twenty-first Amendment (*United States v. Frankfort Distilleries, Inc.,* 324 U.S. 293, 299). The issues raised herein are open. It is still pertinent to inquire whether state liquor legislation bears any real and substantial relation to its constitutional objectives (*Cf. Mahoney v. Triner,* supra, where the question was the political question of the reasonableness of the regulation, the relationship to its ostensible objective apparently being assumed.) The systematic discriminations by Washington are not founded upon considerations of the health, safety and morals of the people of that state in their use and consumption of alcoholic beverages. It is a complete balkanization of the traditional American economic system. California submits that for this the Twenty-first Amendment is no warrant.

ARGUMENT.

I.

THE STATE OF CALIFORNIA HAS STANDING TO SUE AND IS THE PROPER PARTY IN INTEREST HEREIN.

". . . The original jurisdiction of this Court is one of the mighty instruments which the framers

> of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between States. . . . *Trade barriers,* recriminations, *intense commercial rivalries* had plagued the colonies. The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war. Suit in this Court was provided as an alternative."
>
> *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439, 450 (emphasis added).

The Complaint herein discloses a controversy between two states of the type which lead to the creation of the original jurisdiction of the Court, viz.: The State of Washington has acted and is acting to provide economic protection to its own wine industry by erecting discriminatory trade barriers against the movement in interstate and foreign commerce into that state of the competing products of other states, notably California; and

Since 1938 the State of California has carried on, with the facilities of its state government, activities of a commercial nature to promote the sale and consumption of California wine. These activities are carried on in every state of the Union which does not prohibit the purchase and consumption of wine by its citizens and which permits such sales promotion activity. Further, the State has been charged by law with the duty of preventing, modifying or removing trade barriers against the free movement of California wine to market. Its policy in this regard is founded upon the premise, implicit in the Con-

stitution of the United States, that the several states comprise one economic entity.

> "It means that in the matter of interstate commerce we are a single nation—one and the same people."
>
> *Pennsylvania v. West Virginia,* 262 U.S. 553, 596.

The State of California, however, is unable to carry on its promotion of the sale of California wine in Washington because of the practical effect in operation of the official acts of the State of Washington complained of herein. For many years it has sought to have the resulting controversy resolved by amicable methods but without success.

In seeking leave to file its Complaint, the State of California is acting on its own behalf. It is compelled to do so to assert and to protect so-called "quasi-sovereign" rights which inure to it as a state and which are "independent of and behind the titles of its citizens." See *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237.

The quasi-sovereign rights and interest so asserted by the State of California are:

First: Its right as a state to perform functions of government in behalf of its people and in so doing to remain unrestricted and unhampered by official acts of another state which contravene the Constitution of the United States;

Second: Its right to discharge by appropriate action the obligation and duty imposed upon it by

statute to remove existing trade barriers against the sale of California wine in Washington which have no sanction in the Twenty-first Amendment; and,

Third: Its right to protect its economy against unwarranted discriminations by another state and to obtain unobstructed access to the national market for a natural resource and industry which is so essential to the economy of the State that it is declared by law to be affected with a public interest.

A. LEGITIMATE GOVERNMENTAL FUNCTIONS OF THE STATE OF CALIFORNIA ARE DIRECTLY AFFECTED AND RESTRICTED BY THE WASHINGTON STATUTES AND REGULATIONS COMPLAINED OF.

This case is unique in the history of suits between the states in one respect. This bears directly upon the standing of the State of California to sue.

Herein the State of California asserts the right to remain free of discriminatory legislation of another state in carrying on, outside of its own boundaries, interstate activities of a commercial nature to promote the sale of a commodity in interstate commerce. It contends that this aspect of its Complaint is itself sufficient to warrant the granting of leave to file it. None of the prior decisions of this Court concerning its orginal jurisdiction have involved any comparable activity on the part of the complainant state.

1. The wine sales promotion program is that of the State of California.

It is the sales promotion program and activity *of the State itself* which is frustrated by the official actions of the State of Washington.

Under California law, in the distribution and marketing of California wine the functions of the State and of private industry are inexorably intertwined. The $2,700,000 to be spent during the current fiscal year for the State's program of wine sales promotion are obtained by levying a special form of excise tax upon every gallon of California wine prepared for market. It is the State and state officials who are in charge of its expenditure and the resulting activities. It is the State which bears the responsibility for the program, a responsibility which it must, under its laws, discharge, and which it cannot compromise or surrender. If trade barriers obstruct the realization of its program, both the statute and the Wine Marketing Order issued pursuant to its mandate declare that it is the function of the State to see that they are removed. Hence, it is the State which suffers the injury whenever and to the extent that trade barriers, such as those erected by the State of Washington, effectively prevent its promotion of the sale of California wine. Reference to the provisions of the California Marketing Act of 1937 make this readily apparent.

The administration and enforcement of the State's wine advertising and sales promotion program is a function and responsibility of the California Director

of Agriculture, hereinafter called the Director (Calif. Agric. Code §§ 1300.13(a), 1300.19; all section references herein are to this Code). The Director is the executive in charge of the State Department of Agriculture and is appointed by the Governor (§ 21). He is authorized to prepare, issue, administer and enforce plans for promoting the sale of California wine (§§ 1300.12a; 1300.15(b)(8)). Only the Director has authority to issue a marketing order such as that for promoting wine sales and he is empowered to enforce its provisions throughout California (§ 1300.13(a)). He appoints an Advisory Board to assist him in the administration of his order, but its duties are administrative only and subject to his approval (§ 1300.15(a)).

The statute requires that the Wine Marketing Order provide "for the levying and collection of assessments in sufficient amounts to defray the expenses of" advertising and sales promotion activities approved by the Director. Before this special form of excise tax on California wine can be levied and collected, the director is required to approve an annual budget covering such expenses (see Appendix B of Complaint). The statute fixes the minimum assessment rate permissible (§ 1300.17(b)). Failure to pay such assessments is a misdemeanor punishable by fine or imprisonment (§ 1300.19(a)). The collection of such assessments has been upheld by the Courts as a valid exercise of the State's police power (*People v. Sunnyside Winery, Inc.*, unreported, Fresno (Calif.) Superior Court No. 80057 (1950)). The constitutionality

of the California Marketing Act of 1937 is generally assumed in view of *Agricultural Prorate Commission v. Superior Court,* 5 Cal. 2d 550; see *Parker v. Brown,* 317 U.S. 341. Legislation in other states providing for comparable state trade promotion activities has been upheld in *C. V. Floyd Fruit Co. v. Florida Citrus Commission,* 175 Sou. 248 (Fla. 1937); *Miller v. Michigan State Apple Commission,* 296 N.W. 245 (Mich. 1941); *State v. Enking,* 82 Pac. 2d 649 (Idaho, 1938). Judgments for the collection of California wine assessments have been recognized as "tax claims" of the State under the National Bankruptcy Act (*In the Matter of Sunnyside Winery,* unreported, Bankruptcy No. 7056, S.D. Calif. (1954)). The United States Internal Revenue Bureau considers the monies so collected as being "government funds" of the State of California.

When collected, the funds are held by the Director and are disbursed by him only for expenses which have been approved by him with respect to the wine sales promotion program (§1300.17(f)). In short, the program described in the Complaint (par. 42-46) is that of the State of California and all activities pursuant thereto are official acts of the State.

2. The State's sales promotion program is carried out largely outside of California.

About 80% of all California wine moves in interstate commerce and is sold and consumed in states other than California. A commensurate part of the State's promotion of these sales is carried on outside of California.

The State's program is conducted largely by 23 field service representatives, 19 of whom are permanently stationed outside of California, from Wrentham, Massachusetts, to Portland, Oregon; and from Pontiac, Michigan, to Miami, Florida. Offices are maintained in New York City and Chicago. A branch warehouse for the eastern distribution of graphic sales aids and informational literature is in New York.

3. The State's sales promotion activities are commercial in nature.

The wine sales promotion activities of the State are those of a commercial or industrial organization promoting nation-wide sales of its products, or of a trade association of such organizations. California law restricts the nature of the State's activities in only two respects: It forbids the disparagement of other agricultural commodities and the making of false claims, and it requires that the activities shall be directed toward increasing the sale of California wine "without reference to a particular brand or trade name (Calif. Agric. Code § 1300.15(b)(8)).

The State's activities are detailed in paragraphs 42-46 of the Complaint, and an analysis of the current budget therefor is Appendix B thereto. Suffice it here to point out the similarity between one major aspect of the State's program and the sales promotion activities in Washington, authorized by the laws of that State, which are carried on by producers of Washington wine. Both utilize the services of wine wholesalers as an agency or medium in distributing to retailers sales aids, merchandising displays and sales

promotion literature intended for consumer use (*cf.* Complaint, pars. 11 and 46).

4. The State's program is of such a nature as to entitle it to invoke the protection of the Commerce Clause.

The objective of the California statute and the State's activities pursuant to the Wine Marketing Order is "to create new or larger markets" for California wine. This cannot be achieved without thereby actually increasing trade and commerce among the states. The State's promotion work is inseparably and directly related to the sale of California wine in interstate commerce.

> " 'Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches.' Commerce is interstate [Chief Justice Marshall] said, when it 'concerns more states than one.' . . . No decision of this Court has ever questioned this as too comprehensive a description of the subject matter of the Commerce Clause."
>
> *United States v. South-Eastern Underwriters Assn.,* 322 U.S. 533, 550-551, quoting from *Gibbons v. Ogden,* 9 Wheat. 1, 189-190, 194.

It is commercial intercourse between the states when 18 of the California field service representatives are each assigned an area comprising two or more states, in whole or in part, throughout which to travel and promote the sale of wine produced in and to be shipped from California (*cf. Real Silk Hosiery Mills v. City of Portland,* 268 U.S. 325, 335).

Essential elements of the State's program are the interstate distribution of large quantities of sales aids, merchandising displays, and informational literature; the interstate transportation of motion picture films for exhibition to wine distributors and prospective customers; and the interstate movement of wine from California producer to consumers at the State's wine demonstrations, instructional classes for wine salesmen, and "wine tastings". All these are elements of trade and commerce among the states. Their use by wholesale distributors and other sellers of California wine is solicited and arranged for by the State's field service representatives. They play an important role in the negotiations for and solicitations of actual sales of California wine by such wholesale distributors and other sellers.

Describing the reach of the Commerce Clause, the Court has said that:

> ". . . half a dozen enactments, other than the National Labor Relations Act, are sufficient to illustrate that when [Congress] wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not only 'commerce' but also matters which 'affect', 'interrupt', or 'promote' interstate commerce" (*Polish National Alliance v. National Labor Relations Board,* 322 U.S. 643, 647).

For the purpose of obtaining leave to file the Complaint herein it is not necessary to determine whether the State's sales promotion activities are "in commerce" between the states, or whether they merely

"affect" or "promote" such commerce. However, the full extent of Congressional power to regulate under the Commerce Clause is also the measure of the scope of the protection granted against state legislation which discriminates against such commerce. Certainly, it is the measure to be applied in determining the standing of the State of California to file its Complaint herein.

The interstate nature of the sales promotion activities of the State of California clearly distinguishes its situation from that of the complainant State of Louisiana in *Louisiana v. Texas,* 176 U.S. 1, concerning which the Court said:

> ". . . Inasmuch as the vindication of the freedom of interstate commerce is not committed to the State of Louisiana, and that state is not engaged in such commerce, the cause of action must be regarded, not as involving any infringement of the powers of the state of Louisiana, or any special injury to her property, but as asserting that the state is entitled to seek relief in this way because the matters complained of affect her citizens at large" (176 U.S. 1, at 19).

The State of California is not, under the allegations of the complaint a "mere [volunteer] seeking to vindicate the freedom of interstate commerce," *Pennsylvania v. West Virginia,* 262 U.S. at 591. The need to protect its own function as a state, in performing the duties assigned to it by law, give it standing to sue in this action.

B. THE STATE OF CALIFORNIA HAS A RESPONSIBILITY TO COMBAT TRADE BARRIERS AND TO PROTECT ITS ECONOMY AGAINST UNWARRANTED DISCRIMINATIONS BY ANOTHER STATE.

Quite aside from the right to protect its own program of sales promotion activities, the State of California has another basis for filing its Complaint. This is the right to file its Complaint as a necessary and appropriate action to protect the economy of the State from interstate trade barriers and from unwarranted discrimination by another state. Under the circumstances outlined below, it has the right to do so because it has an obligation, a responsibility and the duty to do so.

In all cases dealing with its original jurisdiction the Court has examined into the nature of the interest of the complaining state—"the essential quality of the right asserted" (*Massachusetts v. Missouri,* 308 U.S. 1, 18).

In the cases involving the assertion of "quasi-sovereign" rights the test is primarily whether the complaining state is acting to discharge a responsibility properly entrusted to it by its people. Authority is correlative with responsibility. From the decided cases it is clear that the state has no standing to sue if it is merely a volunteer having no responsibility concerning the subject matter of the litigation. But where the state is charged with a duty or given a responsibility by its people, the authority to take appropriate action in furtherance thereof is a necessary consequence. This principle has been clearly stated by the

Court in terms that apply to the states as well as to the Federal Government, viz.:

> ". . . Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter" (*In re Debs,* 158 U.S. 564, 584).

Thus, in the air pollution case, *Georgia v. Tennessee Copper Co.,* supra, 206 U.S. at 237, it was found that the state had an actionable interest in all the earth and air within its domain. Grievous injury to the health, comfort and prosperity of the people of a state caused by the official acts of another state was relied upon to uphold state action seeking relief in the cases involving water pollution (*Missouri v. Illinois,* 180 U.S. 208, at 241; *New York v. New Jersey,* 256 U.S. 296, at 301-302); the deprivation of stream flow (*Kansas v. Colorado,* 185 U.S. 125, at 142); the curtailment of interstate commerce in gas (*Pennsylvania v. West Virginia,* supra, 262 U.S. at 592); the flooding of land by drainage ditches (*North Dakota v. Minnesota,* 263 U.S. 365, 374). Injury to the economy of the state and to the welfare of its citizens was the basis of the right to sue for relief against discriminatory freight rates in *Georgia v. Pennsylvania R.R. Co.,* supra, 324 U.S. at 450. In *Wyoming v. Colorado,* 286 U.S. 494, 503, the Court found that the interest

of the complainant state affected by the diversion beyond its boundaries of water which it was accustomed to receive was "indissoluably linked with the rights of the appropriators."

Tacitly running through the opinions of the Court in all these cases is the thought that where the state bears an established responsibility to its people, it has the correlative authority to protect the interests, tangible or intangible, so intrusted to its care.

In the instant case the responsibility and duty of the State of California to take appropriate action to remove the trade barriers erected by the State of Washington arises from two separate and distinct sources: one specific, arising out of statute, and the other more general.

1. The specific responsibility of the State to remove trade barriers.

The first of these arises from the express terms of the California Marketing Act of 1937. That act declares that the marketing of wine within California is affected with a public interest. It invokes the police powers of the State to protect the health, peace, safety and general welfare of the people of California (Calif. Agric. Code §§ 1300.10 (c); 1300.12 (a)). The purpose of the act, among other things, is

> "(d) To provide methods and means for the maintenance of present markets or for the development of new or larger markets for [California wine] . . . or for the prevention, modification or elimination of trade barriers which obstruct the free flow of such [California wine] to market" (Calif. Agric. Code, § 1300.11 (d)).

This purpose is carried forward into the specific authorization for the advertising and sales promotion program of the State concerning California wine (§ 1300.15 (b)(8)) and into the terms of the Wine Marketing Order itself (Complaint, par. 40). The latter provides, among other things, for:

> ". . . expansion activities for the prevention, modification or elimination of trade barriers which restrict the free flow of wine produced in California to market, including the presentation of facts to and negotiations with State, Federal or foreign governmental agencies on matters which affect the marketing of wine produced in this state; also such other plans as may be recommended by the Board and approved by the Director pursuant to this Marketing Order, as amended; . . ." (Marketing Order for Wine, as amended, Art. III, Sec. A).

In an effort to discharge the responsibility thus entrusted to it by its people, the State of California has made prolonged and sincere efforts to convince the people of the State of Washington, their elected representatives and their other public officials, of the need for the removal of the trade barriers against California wine which it has erected. In this effort it has expended substantial sums of public monies of the State. Nothing, however, has been accomplished by amicable means to eliminate or even mitigate the trade barriers alleged in the Complaint, all of which have been in effect at least since 1951.

It is significant that the California Marketing Act of 1937 was enacted several years before the State of

Washington devised some of the most onerous of the trade barriers it has erected against California wine (Complaint, par. 26-27). The California statute is not "make-weight" legislation designed for the express purpose of invoking the original jurisdiction of the Court in this case. *Cf. New Hampshire v. Louisiana,* 108 U.S. 76. On the contrary, it established more than twenty years ago, a broad public policy that has since been effectuated by the State throughout the wide range of agricultural enterprises which comprise California's biggest business and means of livelihood. To date, the State has spent over $25,000,000 in its wine promotion program alone. Expenditures on behalf of other aspects of its grape and vineyard industry would swell this figure by several millions more.

In these circumstances, having surrendered, upon its admission to the Union as a state, its historic prerogative of recourse to diplomacy or war, the State of California necessarily turns to the one forum provided by the Founding Fathers at Philadelphia for the settlement of controversies between the states.

> "Bound hand and foot by the prohibitions of the Constitution, a complaining State can neither treat, agree or fight with its adversary [state] without the consent of Congress; a resort to the judicial power is the only means left for legally adjusting, or persuading a State which has possession of disputed territory, to enter into an agreement or compact relating to a controverted boundary."
>
> *Rhode Island v. Massachusetts,* 12 Pet. 657, 726.

The statement is as true concerning disputed boundaries of state conduct as it is concerning boundaries of state territory.

2. The general responsibility of the State to protect its economy and the welfare of its people.

In addition to the foregoing, the State of California also has the more general, but nonetheless definite responsibility of taking appropriate action to make secure the general welfare and prosperity of its people. These functions of state government have long been recognized by the Court as an adequate and proper basis for the filing of an action such as this within its original jurisdiction (See cases cited, ante p. 23).

There is no tightly-phrased rule of universal application by which to test the adequacy of a state's standing to sue on the basis of injury to the prosperity and welfare of its people. The decisions stand pretty much on the facts of each case. There is one conclusion, however, which we believe can be fairly drawn from the reasoning in the Court's opinions. That is, that the quantitative extent of the injury inflicted upon the complaining state is far less important than the nature of the injury alleged—the quality of the actions of the respondent state.

Thus, in none of the cases in which leave to file was granted on the basis of injury to health, comfort and welfare of the people of the complaining state was that state affected in its geographical entirety, nor were all its people directly affected, nor was its entire economic structure injured. In *Kansas v. Colorado,* supra, it was only the "large tract of

land bordering on the Arkansas River" which was involved. Likewise, only a small part of the Empire State was affected by the water pollution at issue in *New York v. New Jersey,* supra. Only the extreme northwestern corner of Georgia was injured by the air pollution involved in *Georgia v. Tennessee Copper Co.,* supra. While natural gas was an important source of energy to the people of Pennsylvania in *Pennsylvania v. West Virginia,* supra, it was not the only source of energy available. In *Georgia v. Pennsylvania R.R. Co.,* supra, the discriminatory freight rates involved were only one element, albeit an important one, in the cost and market value of commodities shipped into and out of the State of Georgia.

The *quantum* of the injury necessary to confer standing to sue thereon has never been defined; in all probability it is undefinable. On this score, we have found no more definite expressions by the Court than its admonition that "the threatened invasion of rights must be of serious magnitude" *(New York v. New Jersey,* supra, 256 U.S. at 309) and conclusionary statements such as "These are matters of grave public concern" *(Georgia v. Pennsylvania R.R. Co.,* supra, 324 U.S. at 451).

On the other hand, in examining the precedents, the Court has considered at length the *nature of the injury* to the welfare, prosperity and economy of the complaining state. Concerning the immediate and direct effect of trade barriers it has said:

> "If the allegations of the bill are taken as true, the economy of Georgia and the welfare of

her citizens have seriously suffered as the result of this alleged conspiracy. Discriminatory rates are but one form of trade barriers."

(The Court had just referred to its responsibility under the Constitution to provide a forum for the settlement of disputes concerning trade barriers to which a state is party.)

"They may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a State as profoundly as any diversion of water from the rivers. They may stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a State or put it at a decided disadvantage in competitive markets. Such a charge at least equals in *gravity* the one which Pennsylvania and Ohio had with West Virginia over the curtailment of the flow of natural gas from the West Virginia fields. . . . These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. . . . If we denied Georgia as parens patriae the right to invoke the original jurisdiction of the Court *in a matter of that gravity*, we would whittle the concept of justiciability down to the stature of minor or conventional controversies. There is no warrant for such a restriction" *(Georgia v. Pennsylvania R.R. Co.*, supra, 324 U.S. at 450-451; emphasis added).

Insofar as the Complaint here is based upon injury to the economy of California and the welfare and

prosperity of its people, it meets all of these standards. There can be no greater control over a product *which is in a lawful market* than to monopolize its distribution, fix its prices at a non-competitively high level, and suppress the promotion of its sale and beneficial use. That is what the State of Washington has done to California wine (but not Washington wine), the consumption and use of which is not prohibited to the people of that state.

Quantitatively, the resulting injury to the economy of California is great, on the basis of both the absolute values inherent in the vineyard and wine industry of California and the relative importance of such industry to the over-all economy of the State.

Agriculture and its related food processing industry towers in importance above all other business enterprises in California. Of all the crops grown in California for human consumption, grapes are the largest in both tonnage and dollar value. The 500,000 acres devoted to vineyards and the associated winery properties exceed 500 million dollars in value. Farm income from grapes has averaged about 120 million dollars a year in recent years. Between 40% and 60% of California grapes are devoted to wine production. During the past ten years, California has produced an annual average of 115 million gallons of wine; all other states of the United States produce an annual average of about 16 million gallons. The value of the product of California wineries at the consumer level is just short of $500,000,000 a year.

All of the foregoing considerations were before the California legislature in 1955, when it adopted the Concurrent Resolution which is Appendix C to the Complaint. Therein the California Legislature recited the role of *parens patriae* in which the State of California has in fact and in law functioned over the decades with respect to its grape and wine industry. In developing and promoting its wine industry, as alleged in paragraphs 39-50 of the Complaint, the State has acquired an interest therein which is more comprehensive and of a different character than that of the individuals and private parties immediately concerned therewith. We submit it has standing to protect that interest.

II.

THE CONTROVERSY HEREIN IS WITH THE STATE OF WASHINGTON.

Bearing on the question of the existence of a justiciable controversy between two states is the fact that it is the official acts of the State of Washington which are complained of. These consist of: (1) Statutes duly enacted by the Washington Legislature, (2) rules and regulations promulgated by the Washington State Liquor Control Board within and pursuant to its statutory authority, and (3) administrative actions by that Board acting within the discretionary authority conferred upon it by the Washington statutes (Complaint, pars. 20, 25, 30).

There is no question here of the "mal-administration" of state laws by an irresponsible or unauthorized official. Neither is there any question of the absence of official confirmation or ratification by the respondent state of the acts of its agents, such as controlled the decision of this Court in *Louisiana v. Texas,* 176 U.S. 1, 22-23. Compare: *Arkansas v. Texas,* 346 U.S. 368, 370-371; *Kansas v. Colorado,* 185 U.S. 125, 142; *Missouri v. Illinois,* 180 U.S. 208, 242; *New York v. New Jersey,* 256 U.S. 296, 302; where the action complained of was state action and the jurisdiction of the Court upheld.

III.

THIS COURT IS THE ONLY PROPER FORUM OF A CONTROVERSY BETWEEN TWO STATES.

A. CONGRESS HAS MADE THE COURT'S JURISDICTION OVER THIS CASE EXCLUSIVE.

We are not unmindful of the circumstances which require the Court to protect its appellate docket (see dissenting opinion of Chief Justice Stone, *Georgia v. Pennsylvania R. R. Co.,* supra, 324 U.S. at 470). Where a state seeks to invoke the original jurisdiction of the Court, the Court's concern over the availability of another forum is quite to the point.

It has been held from an early date that the grant of original jurisdiction to the Court by Article III, Section 2, Clause 2, of the Constitution is not exclusive (*United States v. Ravara,* 2 Dall. 297). In *Ames v. Kansas,* 111 U.S. 449, 469, 472, it was held that Con-

gress is authorized to grant to the lower federal courts jurisdiction in cases where this Court is vested by the Constitution with original jurisdiction. If Congress has the power to grant to the lower federal courts concurrent jurisdiction with this Court over controversies between two states, Congress also has the power to withhold such grant.

At all times since the enactment of the Judiciary Act of 1789, Congress has provided that concerning *controversies between two or more states,* the jurisdiction of this Court shall be original and *exclusive.* The present statute provides:

> "(a) The Supreme Court shall have original and exclusive jurisdiction of:
>
> (1) All controversies between two or more States;"
>
> (28 U.S.C. § 1251(a)(1).)

To date this Court has never denied its original jurisdiction to a controversy between two states in an otherwise proper case on the ground that there was another forum available. The remarks of the Court in *Georgia v. Pennsylvania R. R. Co.,* 324 U.S. at 464-465 concerning its discretionary power to withhold its original jurisdiction from a complainant state is, of course, to be taken in the context of that case which did not involve a controversy between states. The authorities relied upon do not indicate differently. In *Massachusetts v. Missouri,* supra, the Court's remarks about an alternative forum in state or lower federal courts (308 U.S. at 18) were not made with reference to any controversy between the two states (see 308

U.S. at 15). They related only to Massachusetts' right to sue three citizens of Missouri who had also been named as defendants in the complaint.

Where, as here, the controversy is between two states, the question of an alternative forum is, more precisely, the question of an alternative *federal* forum. The reason why the judicial power of the United States includes controversies between two or more states has been recognized by the Court in these words:

> ". . . 7th. To controversies between two or more states; because domestic tranquility requires that the contentions of states should be peaceably terminated by a common judicatory; and, because, in a free country justice ought not to depend on the will of either of the litigants. . . ."
>
> (Chief Justice Jay, in *Chisholm v. Georgia,* 2 Dall. 419, 475.)

B. THE QUESTIONS OF LAW MUST ULTIMATELY BE DECIDED BY THIS COURT.

The questions of law raised by the Complaint arise directly from the Constitution of the United States. In such matters, this Court is, of course, the final arbiter. Hence, the commencement of this case in any other court, if, indeed, any other court has jurisdiction, would only postpone submission of the matter to this Court, after delays costly in both time and money to both parties. This is especially so in view of the fact that, concededly, the State of California has the burden herein of convincing the Court of the need for some modification of expressions which appear in its

prior opinions construing the Twenty-first Amendment.

C. THERE IS NO PRIVATE LITIGATION INVOLVING THE ISSUES HEREIN.

It has been argued in other cases that the Court should not exercise its original jurisdiction in a controversy between states where private litigation involving the same issues is pending (*cf. Wisconsin v. Tennessee,* 350 U.S. 955, mem. dec. denying leave to file). Here, however, no such suit is pending in any court. Moreover, investigation has revealed that it is unlikely in the extreme that a private case involving the issues raised herein will ever be brought. This is a natural consequence of the present Washington law under which the State Liquor Control Board is the only purchaser of California wine in Washington. The Board has the uncontrollable discretion of ceasing to buy or refusing to buy wine from any California supplier for any reason, or even without giving a reason. The Board's regulations specifically provide for the removal from its sales list of the products of any wine producer violating Board regulations such as its prohibition against such producer contacting any retail licensee within the State of Washington "by mail or otherwise" (Wash. Liq. Cont. Bd. Reg. No. 113(d) and (e)). While such restriction upon the use of the United States Mails and the discrimination herein complained of might seem to be provocative of protest by California wine producers, the practical consequences of the monopoly control of distribution to which California wine (but not Washington wine) is

subjected in Washington are far-reaching. The threat of administrative curtailment of purchases or refusal to purchase a particular brand of California wine is and will continue to be an effective deterrent to private litigation.

For all of the foregoing reasons, the Complaint herein complies with the standards which have been evolved by the Court concerning the exercise of its original jurisdiction.

IV.

THE SUBSTANTIVE QUESTIONS PRESENTED BY THE COMPLAINT.

A. THE COMPLAINT SHOWS A JUSTICIABLE CONTROVERSY ARISING FROM WASHINGTON'S ECONOMIC DISCRIMINATIONS AGAINST CALIFORNIA WINE.

California seeks jurisdictional leave to file its complaint in this proceeding in order to raise a single issue of substance, viz.:

Can a state, which does not prohibit the use and consumption of wine by its citizens, prescribe *a wholly different economic system* for the distribution, marketing, pricing and sales promotion of wine produced within that state than for wine produced elsewhere, and thereby confer economic and competitive advantages upon locally produced wine which are denied to wine produced elsewhere?

This general question can be subdivided as follows:

(1) Where a state grants to local wine producers the privilege of distributing and selling their wine,

either directly or through privately-owned wholesalers of their own selection to some 4,800 retail licensees, can that state monopolize the distribution and sale of all wine produced elsewhere which moves into the state in interstate and foreign commerce?

(2) Where a state grants to local wine producers and to retail licensees the privilege of determining the prices at which their respective sales of locally produced wine shall be made, without any state control over the level of such prices, can that state use a monopoly power over the distribution of wine produced elsewhere to fix prices for its sale at levels which make it non-competitive with wine produced locally, and which destroy the economic incentive of licensed retailers to deal in such out-of-state wines?

(3) Where a state confers upon local wine producers the privilege of actively soliciting and promoting the sale of locally produced wine by direct contact with licensed retailers and otherwise, can that state deny to producers of out-of-state wines the privilege of likewise soliciting and promoting the sale of their respective products by the same means, methods and practices which are permitted with respect to wine produced locally?

The statutes, regulations and other official acts of the State of Washington which give rise to these questions are set forth in the Complaint, paragraphs 18-34. The practices and operations of the favored wine industry of Washington within this discriminatory scheme of regulation are described in the Complaint, paragraphs 6-17. They need not be repeated here.

It will be the position of California on the merits of this important controversy that the discrimination is unconstitutional by virtue of the Commerce Clause and of the Privileges and Immunities Clause of Article IV, Section 2.[1]

B. WINE IS A LAWFUL OBJECT OF COMMERCE IN WASHINGTON.

Before analyzing the nature of this controversy, it should be clearly stated that in this action California does not contend for any limitation on the power of each state, in the light of the Twenty-first Amendment, to determine to what extent, if any, the movement into that state of any alcoholic beverage should be permitted. Neither is there any plea for limitation on the power of a state to regulate and control any activity which is fairly and substantially related to the objectives of its policy concerning the use and consumption of alcoholic beverages by its citizens (see concurring opinion of Justice Frankfurter, *Carter v. Virginia*, 321 U.S. 131, 139).

Undoubtedly, a state may monopolize the sale and distribution of all alcoholic beverages to its citizens. But this, the State of Washington has not done. Undoubtedly, a state may fix and determine the prices at

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[1]California reserves but, in respect to the Motion for Leave to File a Complaint now before the Court, does not press the contention that the discrimination is also in conflict with the Equal Protection Clause of the Fourteenth Amendment. See Complaint, par. 37. It is California's position that no prior decision validates such a system of economic discrimination in favor of local industry under either the Commerce or the Privileges and Immunities (Art. IV, Sec. 2) Clauses, but that the issue under the Equal Protection Clause may have been partially foreclosed by what was said in *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401.

which all alcoholic beverages shall be sold to its citizens. But this, likewise, the State of Washington has not done.

Important is this: Washington has licensed some 4,800 retailers to sell wine to consumers and does not forbid these retail licensees to sell, nor forbid the consuming public to buy, California wine. In short, at the critical point of supply to the consumer, Washington makes no classification and asserts no restriction based upon the place of origin of wine. It therefore cannot be said that a difference in the place of origin of wine, on which the discriminations at the distribution level here challenged are based, has any relation to the health, safety or morals of Washington citizens. The Washington system is not in aid of state control of the liquor traffic.

The Court, in short, will here be concerned with a regulatory system of discriminations which do not limit, forbid or control the use and consumption of alcoholic beverages. It will be faced, instead, with the much different issue of discriminations in economic competition between the products of two states at the level of production and distribution. The sole motivation and effect of the Washington regulatory system is not prohibition but economic localism. The controversy here arises from the denial to California citizens of privileges expressly granted by the State of Washington to its own citizens, and from the discriminations practiced by the State of Washington against California wine lawfully admitted into Washington in favor of Washington wine.

C. THE WASHINGTON SYSTEM VIOLATES THE COMMERCE CLAUSE AND THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV, SECTION 2, AND IS NOT SANCTIONED BY THE TWENTY-FIRST AMENDMENT.

Throughout the Constitution the theme of economic unity in the nation is second in importance only to the personal guarantees embodied in the Bill of Rights. No other aspect of American institutions and life pervades so many different provisions of the Constitution. The Commerce Clause is only one of its manifestations. It is implicit in the Preamble. It is explicit in every one of the powers granted to Congress by Article I, Section 8, excepting only matters relating to national defense and the establishment of lower Federal courts. It is involved in the Privileges and Immunities Clause of Article IV, Section 2, and in the Fourteenth Amendment.

The constancy of this theme of economic unity has a direct bearing upon the proper scope of the Twenty-first Amendment. That amendment broke with precedent for a specific purpose. Its effect upon the existing provisions of the Constitution is as limited as it is definite. The official actions of the State of Washington herein complained of are repugnant to the rule of economic unity, are not justified by the Twenty-first Amendment, and violate the specific provisions of both the Privileges and Immunities Clause of Article IV, Section 2, and the Commerce Clause. These points will be discussed in order.

1. Privileges granted its own citizens by the State of Washington are denied to citizens of California in violation of the Privileges and Immunities Clause of Article IV, Section 2.

The California wine industry comprises 97 individual proprietorships, 61 partnerships and 103 corporations. Included in the corporations are 31 co-ops. Thus some 60% of the producers of California wine are individual citizens of California, entitled to the privileges and immunities guaranteed by Article IV, Section 2, of the Constitution, which provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The intendment and effect of this provision has long since been established, in an open-ended manner, by the Court. We need not go beyond the Court's opinion in *The Slaughterhouse Cases,* 83 U.S. 36. Searching for the meaning of Article IV, Section 2, the Court quoted from the 4th of the Articles of Confederation:

> "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, . . . shall be entitled to all the privileges and immunities of free citizens in the several States; and . . . shall enjoy therein all the privileges of *trade and commerce,* subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively" (Emphasis added).

The Court said that Article IV, Section 2, was the corresponding provision of the Constitution which superseded the Articles of Confederation, and that

> "There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned. . . ." (83 U.S. at 75).

As to Article IV, Section 2, the Court said:

> "Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction" (83 U.S. at 77).

Dissenting on points not relevant here, Mr. Justice Field stated specifically:

> "It will not be pretended that under the fourth article of the Constitution any State could create a monopoly in any known trade or manufacture in favor of her own citizens, . . . She could not confer, for example, upon any of her citizens the sole right to manufacture shoes, or boots, or silk, or the sole right to sell those articles in the State so as to exclude non-resident citizens from engaging in a similar manufacture or sale. The non-resident citizens could claim equality of privilege under the provisions of the fourth article with the citizens of the State exercising the monopoly as well as with others, and thus, as respects them, the monopoly would cease" (83 U.S. at 101).

What the State of Washington has done with the privilege of selling wine to licensed retailers in that state falls squarely within the ban of Article IV,

Section 2. As already noted, Washington makes no distinction based upon the place of origin of wine, either in the right of licensed retailers to sell wine or in the right of its citizens to purchase and consume wine. It is only in the distribution channels through which wine reaches the licensed retailers, in sales to them, and in the promotion of sales to them, that the State of Washington makes a distinction based on the origin of wine. Here Washington law has conferred exclusively upon producers of Washington wine four privileges—and they are privileges, and not matters of right:

(a) The privilege of selling their wines to licensed retailers either directly or through the medium of any of the 135 privately-owned wine wholesalers licensed for that purpose (Rev. Code Wash. § 66.24.210);

(b) The privilege of soliciting orders for their wine from retail licensees (Rev. Code Wash. § 66.28.050);

(c) The privilege of directly contacting retail licensees in any manner and by any means to induce or promote the sale of their respective wines (Wash. Liq. Cont. Bd. Reg. No. 113(d)); and

(d) The privilege of determining the prices at which their respective wines are sold to licensed retailers (Wash. Liq. Cont. Bd. Reg. No. 81).

That these privileges are granted to *citizens* of the State of Washington can readily be demonstrated. Section 66.24.210 begins:

> "All wines manufactured or produced in domestic wineries may be sold by the manufacturer or producer thereof direct to persons . . . [hold-

ing retail or domestic wine wholesalers' licenses or to other domestic wineries]."

The statute defines a "domestic winery" as a "place where wines are manufactured or produced within the state . . ." (Rev. Code Wash. § 66.04.110). In point of fact, all of the producers of Washington wine are either Washington corporations or partnerships comprising individual citizens of the State of Washington.

Each of the above-mentioned privileges is expressly denied to citizens of California who, as individual proprietors or as individual members of partnerships, comprise 60% of the producers of California wine (Rev. Code Wash. §§ 66.24.210, 66.28.050, Reg. No 113(d)).

The denial of these privileges works a discrimination and competitive economic disadvantage to California citizens. Hence, it is clearly in violation of Article IV, Section 2, Clause 1. *The Slaughter House Cases,* supra; *Blake v. McClung,* 172 U.S. 239; *Ward v. Maryland,* 12 Wall. 418. Violation of this provision was not discussed by the Court in any of its prior opinions construing the Twenty-first Amendment.

One aspect of the relationship between the Privileges and Immunities Clause of Article IV, Section 2, and the Twenty-first Amendment should be noted carefully. It cannot be doubted but that the latter was adopted in aid of the effectuation of the self-determined policy of each state concerning prohibition of the consumption of alcoholic beverages by its citizens. As Justice Black has stated:

> ". . . Though the precise amount of power it has left in Congress to regulate liquor under the Commerce Clause has not been marked out by decisions, this much is settled: *local,* not national, regulation of the liquor traffic is now the general Constitutional policy . . ."
>
> (Concurring opinion, *Carter v. Virginia,* 321 U.S. 131, 138; Emphasis added).

The application of the Privileges and Immunities Clause of Article IV, Section 2, to state liquor legislation cannot possibly do violence to this intendment of the Twenty-first Amendment. Peculiarly, this clause makes the *local policy* of a given state, as established by its own laws with respect to its own citizens, the full and complete measure of the protection against discrimination which it grants to citizens of other states. It follows that the clause cannot be invoked to coerce, modify or frustrate the policy of a state concerning prohibition, or the lack of it, within its boundaries.

2. The discriminations against interstate commerce are a violation of the Commerce Clause which has no sanction in the Twenty-first Amendment.

This case is unique. A state has prescribed a system of free competition in the distribution and marketing of a locally-made product and prescribed that the same product entering the state in interstate and foreign commerce should be subjected to monopoly control for the purpose and with the effect of thereby protecting local industry.

There is scarcely need of citing authority that such discrimination would violate the Commerce Clause, if the product involved were anything but an alcoholic beverage. See *Baldwin v. Seelig,* 294 U.S. 511. Since the commodity here involved is wine, however, we must squarely consider the decisions of the Court which construe the Twenty-first Amendment. The leading cases in this field are four. Of these, three involved liquor taxes *(State Board of Equalization v. Young's Market,* 299 U.S. 59; *Indianapolis Brewing Co. v. Liquor Commission,* 305 U.S. 391; *Joseph S. Finch & Co. v. McKittrick,* 305 U.S. 395); the fourth involved a requirement that liquor transported into the state must have its brand name registered in the United States Patent Office, liquor produced within the state being free from such requirement *(Mahoney v. Joseph Triner Corp.,* 304 U.S. 401).

California will not ask the Court to overrule these or any of its other previous decisions construing the Twenty-first Amendment. The uniqueness of the facts here makes this unnecessary.

California will, however, request the Court to reconsider some of the more extreme implications of the language used in these earlier opinions. It has no hesitancy in so doing, because here involved is the construction of the Constitution of which the Court is the final arbiter.

This Court has on a number of occasions distinguished or severed earlier decisions interpreting constitutional provisions in the light of new developments, e.g., *Brown v. Board of Education,* 347 U.S. 483; *United States v. Southeastern Underwriters,* 322

U.S. 533. See also *Smith v. Allwright,* 321 U.S. 649, 665-666 and the dissenting opinion of Mr. Justice Brandeis in *Burnett v. Coronado Oil & Gas Co.,* 285 U.S. 393, 405. The Twenty-first Amendment itself, and not the language of decisions construing it, controls. As Justice Frankfurter pointed out in *Graves v. New York ex rel. O'Keefe,* 306 U.S. 466, 491-92, the Constitution itself is the "ultimate touchstone of constitutionality".

The Court's opinions of the 1930's were written before there was any experience with statutes such as those of Washington which California challenges here. The domestic wine industry was small in 1936; the pattern of discriminatory restraints had not emerged. We believe that the intervening time has shown that it is appropriate to reconsider the question for the following reasons:

(a) The Twenty-first Amendment was not enacted to justify a system of discriminatory economic restraints on foreign wine, the purpose and effect of which is merely to favor the local wine industry.

It will be the position of California that the clear purpose of the Twenty-first Amendment was to enable states which voted to continue prohibition or regulation of consumption after the repeal of the Eighteenth Amendment to make that decision effective by preventing an influx of liquor from non-prohibition states.

The Amendment was designed, in the words of Senator Blaine of Wisconsin, principal spokesman for the bill which was later adopted as the Amendment, "to insure the so-called dry States against the

importation of intoxicating liquors into those States" (76 Cong.Rec.4141).[2]

Furthermore, the purport and language of the Twenty first Amendment was drawn directly from the Webb-Kenyon Act, 37 Stat. 699, as amended in 1935, 49 Stat. 877, 27 U.S.C. § 1, note, which prohibits:

> "the shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State . . . into any other State . . . to be received, possessed, sold, or in any manner used, either in the original package or otherwise, *in violation of any law* of such State" (Emphasis added).

Since its enactment, the phrase "in violation of any law of such state" as used in Webb-Kenyon has been declared by the courts to mean "proper laws". Even before the enactment of the Twenty-first Amendment, Section 1 was judicially held not to authorize discriminations against interstate commerce not required for the purpose of regulating the liquor traffic, *Evansville Brewing Ass'n v. Excise Commission,* 225 Fed. 204 (1915); *Brennan v. Southern Express Co.,* 106 S.C. 102, 90 S.E. 402. As stated in the latter case:

> "It [the Webb-Kenyon Act] was not intended to confer and did not confer upon any state the power to make injurious discriminations against the products of other states which are recognized

---

[2]This was the view of contemporaneous authorities. Notes, 7 So. Calif. L. Rev. 230 (1934); 28 Ill. L. Rev. 950 (1934); 83 U. of Pa. L. Rev. 510 (1935). Independent writers who have retraced the legislative history are in accord with this position. Comment, The *Twenty-first Amendment versus the Interstate Commerce Clause,* 55 Yale L.J. 815 (1946); Carr, *Liquor and the Constitution,* 7 L. & Contemp. Prob. 709, 710 (1940).

> **as subjects of lawful commerce by the law of the state making such discriminations . . ." (90 S.E. at 404).**

The courts continued to adhere to this interpretation of Webb-Kenyon after the Twenty-first Amendment. *Dugan v. Bridges,* 16 F. Supp. 694; App. Dism. 300 U.S. 684; *Commonwealth v. One Dodge Motor Truck,* 326 Pa. 120, 191 Atl. 590. This has been consistently the policy of Congress; it was so recognized by this Court in considering the earlier Wilson Act *(Scott v. Donald,* 165 U.S. 58, 100).

The Twenty-first Amendment uses the phraseology of Webb-Kenyon in its own text. In carrying the statutory language forward into the Amendment, Congress must be considered as having thereby adopted the existing case-law interpretations of the statute. The Congressional policy with respect to the Amendment can, therefore, only have been one of condemnation of state laws which prescribe competitive distribution for local products and monopoly control over out-of-state products, where both are "subjects of lawful commerce by the law of the state making such discrimination."

(b) The Twenty-first Amendment did not Lodge Plenary Power over Commerce in Alcoholic Beverages in the States.

It would be anomalous indeed to interpret the Amendment otherwise. Such an interpretation would construe a provision of the Constitution in disregard of its context and in such a way to invalidate other provisions which from time immemorial have been the very keystone of constitutional policy. Nor do we

think that *Young's Market* really supports such a position. It does not mean that the restraints of our federal system on parochial state economic legislation are to be completely ignored in the field of alcoholic beverages. In *Young's Market* the Court flatly denied that its decision involved a declaration "that the [Twenty-first] Amendment has, in respect to liquor, freed the states from all restrictions upon the police power to be found in other provisions of the Constitution" (299 U.S. at 64).

The history of the Twenty-first Amendment does, as indicated, make clear that its draftsmen meant merely to arm the states with control over importation of alcoholic beverages where such control would do service in the name of a state-wide rule of prohibition or other regulation of consumption. Liquor laws were not meant to be called to the aid of parochial business preferences.[3] *Young's Market* involved a $500 fee for license to import beer into California. Justice Brandeis specifically stated that the issue was whether such a burden, admittedly in conflict with the Commerce Clause regardless of the nature of the regulation of sellers of local beer, was sanctioned by the Twenty-first Amendment. As he pointed out, "the case does not present a question of *discrimination prohibited* by the commerce clause" (299 U.S. at 62; emphasis added).

---

[3]Two years after the adoption of the Twenty-first Amendment, speaking through Justice Cardozo, the Court was of the view that ". . . In licensing or prohibiting the sale of intoxicating liquors a state does not attempt to neutralize economic advantages belonging to the place of origin . . ." (*Baldwin v. Seelig*, supra, 294 U.S. at 528.)

The instant case, however, involves not merely a burden, but an economic discrimination, with the intent and effect, not to reduce or control liquor consumption but to place local industry in a favored position to cater to existing demand.[4] The Twenty-first Amendment did not legitimatize whatever legislation a state might enact, so long as the subject matter is liquor. Liquor is admittedly in a different category from other articles moving in interstate commerce. The precise limits of state authority have not yet been marked out by the cases. But it is clear that that authority is still subject to a residuum of limitations under the terms of the federal system as set forth in the Constitution. See *United States v. Frankfort Distilleries,* 324 U.S. 293, 299; *Carter v. Virginia,* 321 U.S. 131.

This case challenges a system of import regulation, the function and purpose of which is not to regulate the traffic or consumption of alcoholic beverages; at the retail level no discrimination is made between Washington and California wine. The effect of the Washington statutes and regulations is exhausted as soon as wine is in the hands of retailers licensed to sell wine to the consuming public.

In short, California will take the position that the Twenty-first Amendment does not validate the Washington system because that system is not designed "to permit the State to control the liquor traffic . . ." (see concurring opinion of Justice Frankfurter in

[4]During the past 20 years, as a result of the trade barriers erected by Washington, the growth of the Washington wine industry has been at the expense of interstate commerce in California wine. (See statistics, Complaint, par. 7, 13, 17).

United States v. Frankfort Distilleries, supra, 324 U.S. 300).

Examination of the cases construing the Twenty-first Amendment shows that the Court has not, as some have supposed, declared that in a proper case it would refuse to apply the usual test of determining whether the legislation in question has any relation to its legitimate objectives. California contends that this is just such a case and that no such relationship exists.

The constitutional significance of discriminatory trade barriers was not raised in *Young's Market,* while in *Triner,* which did involve discrimination, the challenge was based solely on the Equal Protection Clause. Hence, the issues raised herein are open. This Motion for Leave to File its Complaint by the State of California is intended to raise that ripe justiciable controversy.

D. Liquor administration officials of substantially all states favor abolition of trade barriers.

In 1951, the two largest national organizations most directly concerned with state control of intoxicating liquor instituted a joint effort to make a study of trade barriers. These organizations were the National Conference of State Liquor Administrators and the National Alcoholic Beverage Control Association. The first of these was formed in Chicago in 1934. Twenty-nine states and the City of Baltimore hold membership. These member states are those in which the alcoholic beverage business is conducted as a private enterprise under a system of licensing. The second

association, the NABCA, was organized in 1937. It represents sixteen of the seventeen monopoly states in which the states themselves participate to various degrees in the alcoholic beverage business.

These two organizations formed a joint committee composed of state liquor officials to report on trade barriers in the industry. Their report was published in 1952. It unanimously condemned local discrimination against liquor imported from other states. It defined the purpose of the Twenty-first Amendment as follows:[5]

> "Under the 21st Amendment, each state has the right to determine what is needed in the way of regulation and control of the alcoholic beverage business within its borders to protect the health, welfare, safety and morals of its people.
>
> "As recorded in our first report, we found that 'alcoholic beverage control should be commensurate with its purposes.' *It is significant that nowhere has it ever been expressly stated or even implied that a purpose of control is to protect home industry or agriculture from out of state competition.* Yet it is evident that by statute, rule and regulation individual states have attempted to justify measures that contribute nothing to control. This, we find, is a perversion of the high purposes and sound logic of state control and we denounce it unequivocally.
>
> "We believe that the purposes of the 21st Amendment to vest complete control of the alcoholic beverage industries in the individual states

---

[5] "*Trade Barriers Affecting Interstate Commerce in Alcoholic Beverages*", Joint Committee of the States to Study Alcoholic Beverages (Cleveland, 1952), p. 12.

must not be distorted by legislative enactments or judicial interpretations, and that the states should continue in possession of the rights and prerogatives of alcoholic beverage control. We are equally certain, however, that in the enjoyment and exercise of these rights the states should honestly respect the purposes of that Amendment and that in shaping control procedures they should be guided accordingly. We fear that continued refusal to limit their interference with interstate commerce to measures which are reasonably related to control and which are motivated by a bona fide desire to accomplish its proper objectives will lead ultimately to countermeasures which will adversely affect the rights of the States in the field of control."

Findings such as these should be given weight. They indicate clearly that those who are experts in the field do not think that the Twenty-first Amendment should be held to sanction discriminatory restraints like those here challenged.

CONCLUSION.

For the reasons stated, the Motion for Leave to File a Complaint should be granted.

Dated, February 11, 1958.

EDMUND G. BROWN,
Attorney General of the State of California,
WALLACE HOWLAND,
Assistant Attorney General of the State of California,
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Attorneys for Plaintiff.

Certificate of Service

The undersigned, a member of the bar of the Supreme Court of the United States, and one of the counsel of record for the plaintiff, hereby certifies:

That on the 11th day of February, 1958, he served the within and foregoing "Brief in Support of Motion for Leave to File a Complaint" upon the State of Washington, the defendant, as prescribed by Rules 9 and 33 (par. 3(b)) of said Court:

He deposited at the post office at San Francisco, California, two copies of the said Brief, securely enclosed in an envelope, air mail postage prepaid, addressed to each of the following officials of said defendant State at his post office address, as shown below:

Honorable Albert D. Rosellini,
Governor of the State of Washington,
State Capitol,
Olympia, Washington.

Honorable John J. O'Connell,
Attorney General of the State of Washington,
State Capitol,
Olympia, Washington.

Edmund G. Brown.

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Supreme Court of the United States

OCTOBER TERM 1957

No. 14, Original

STATE OF CALIFORNIA,

Plaintiff,

against

STATE OF WASHINGTON,

Defendant.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

AND

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF COMPLAINT

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Supreme Court of the United States

OCTOBER TERM 1957

No. 13 Original

STATE OF CALIFORNIA,

Plaintiff,

against

STATE OF WASHINGTON,

Defendant.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now Louis J. Lefkowitz, Attorney General of the State of New York, and moves this Honorable Court for leave to file the annexed brief herein as *Amicus Curiae* in support of the position taken by the plaintiff in its complaint herein.

LOUIS J. LEFKOWITZ,
Attorney General of the State
of New York,
The Capitol,
Albany 1, New York.

March 20, 1958.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1957

No. 13 Original

STATE OF CALIFORNIA,

Plaintiff,

against

STATE OF WASHINGTON,

Defendant.

BRIEF OF THE STATE OF NEW YORK *AMICUS CURIAE*

Statement

The State of California has shown in its complaint that it is a State in which wine is produced in substantial quantities, and is exported from the State and moves in interstate commerce.

The State of New York is likewise a wine-producing State, and wine produced in it is also sent to consumers without the State and moves in interstate commerce. While public records are not kept to show the addresses of consumers, the fact is that wines to the value of $4,000,000, in round numbers, are sent out from New York in interstate commerce each year.

While substantially all of this merchandise is sold to consumers east of the Mississippi River, yet if the statutes which have been adopted by the State of Washington

should be upheld, it is a safe assumption that eastern wine-producing States (Michigan, New Jersey, Ohio and Pennsylvania), in which New York wines are in substantial competition with local wines, would at once go about adopting hostile legislation and erecting trade barriers such as are complained of in the instant case.*

The protection of the wine industry of New York from unconstitutional discriminatory legislation passed by other States is of importance to its welfare. There are twenty wineries operating in New York State.† Their annual product is valued at two and a quarter million dollars. The gallonage thus represented is twelve and one-half million gallons. Two thousand workers are employed in the industry, plus part-time seasonal workers, concerning whom accurate data are not available. The annual payroll of the industry is about two million dollars.

We have set forth in Appendix "A", to which we beg leave to refer the Court, a true copy of a statistical report prepared jointly by the United States Department of Agriculture and the New York State Department of Agriculture and Markets.

We have further set forth in Appendix "B" and Appendix "C" data supplied to us by the United States Treasury Department, Internal Revenue Service, showing taxable withdrawals of wine in New York State.

---

* Michigan has already adopted hostile legislation. 13 Mich. Stat. Ann. § 18.987(1). So has New Jersey: L. 1940, ch. 83, § 2-b; L. 1949, ch. 276, § 2-a. These laws are also found in N. J. Stat. Ann., 33:1-10, §§ 2-a and 2-b.

† Plus 19 other organizations which either sell grapes, or make and sell bottled grape juice (not wine), or sell their product to out-of-the-State concerns. These may finally market the product as grape juice or as wine.

I

Precedents exist for recourse to the Court's original jurisdiction on facts such as are presented here.

While the State of New York does not itself carry on the business of selling wines, yet its citizens do; and that circumstance, it is submitted, entitles the State to stand side by side with the State of California, and join it in its remonstrance against the statutes of the State of Washington to which this Court's attention has been called in the plaintiff's brief. We may employ the language used in *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230 (1905), and say that the State of New York "has an interest independent of and behind the titles of its citizens" in wine and the profits from its distribution in the instant case, just as Georgia had an interest in the earth and air within its domain (p. 237) in the cited case.

Georgia v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945), is also pertinent. This Court there recognized the right of Georgia as *parens patriae* to secure injunctive relief against an injury to its economy through discriminatory freight rates (p. 450). And if, as was there held (p. 452), a State is a "person" for the purpose of enforcing the civil sanctions of the anti-trust laws (especially Clayton Act, § 16 [15 U. S. Code, § 26]), a State should be deemed a "person" for the purposes of injunctive relief against statutes which are, in effect, tariff walls designed to exclude the products made by citizens of the plaintiff State.

Language in *Louisiana* v. *Texas*, 176 U. S. 1, 19 (1900), which is in seeming conflict with *Georgia* v. *Pennsylvania R. Co. supra*, should, we submit, be deemed overruled by the latter case.

II

The Washington statutes contravene the commerce clause.

(1)

The statutes of Washington seek to bring about a retrogression to colonial times. It is well known that "trade barriers, recriminations, intense commercial rivalries had plagued the colonies." *Georgia* v. *Pennsylvania R. Co.*, *supra*, at p. 452. Precisely these "plagues" are revived by the Washington statutes. We are able to cite three forms of discrimination deliberately set up by the statute and productive of trade barriers:

	Washington Wines	*California and New York Wines*
1.	May be distributed by producers directly or through privately incorporated wholesalers with whom producers are free to contract.	May only be distributed by the Washington state authorities.
2	Producers may fix the price at which they will sell to retail licensees.	The State of Washington fixes the prices at which wines from other States may be sold to retail licensees.
3.	Producers may employ salesmen and advertising to make Washington wine known to the market.	Persons offering wine from other States for sale may not employ salesmen to put it in the hands of retail licensees, nor advertise it.

(2)

Nothing is more obvious, when we look into the history of our country, than that the Washington statutes are *par excellence* "plagues" such as Mr. Justice DOUGLAS had in

mind in writing the opinion in *Georgia* v. *Pennsylvania R. Co., supra.*

Among pre-Revolutionary sources, we may cite 3 FARRAND'S *Records of the Federal Convention*, pp. 478, 547, 548; and *The Federalist*, Essay No. 42.

In WOODROW WILSON'S *History of the American People*, Vol. V, pages 32 and 34, we find the following:

> "A war of tariffs succeeded the war of arms—a war in which each state acted for itself * * * each state studied its own interest and knew not how to advance even that successfully. American commerce had everywhere the worst of it."

JOHN B. MCMASTER tells us the same story. In his *History of the People of the United States from the Revolution until the Civil War*, the matter is discussed in Vol. I, pp. 204-207. At p. 207, he says:

> "Congress had no power to regulate commerce but each state, left to itself, ordered its own trade in its own way; and the way of one state was always different from the way of another. The commerce which Massachusetts found it to her interest to encourage, Virginia found it to hers to restrict. New York would not protect the trade in indigo and pitch. South Carolina cared nothing for the success of the fir interests. New England derived great revenues from lumber, oil and potashes; Pennsylvania from corn and grain, and were in nowise concerned as to the prosperity of the trade of their neighbors. Articles which Connecticut and New Jersey excluded from their ports by heavy tonnage duties entered New York with scarcely any other charges than light money."

We ask the Court's permission to quote at some length from F. S. OLIVER, *Alexander Hamilton: An Essay on American Union* (1912), in which, in a passage characterized by great felicity of style, he says (pp. 134-135):

"Power, prosperity and consideration, which all men affected to desire, were only to be had on terms which the states could not bring themselves to pay. The dignified entreaties of Washington, the unanswerable reasoning of Hamilton, failed to move their light minds. The number of the plagues were still incomplete. The citizens hardened their hearts; preferring, like Pharaoh, to endure the murrain, the locusts, and the darkness, rather than abandon their mean jealousies, their rivalries at once sordid and malicious; rather than part with, or delegate, a single shred of local sovereignty to clothe the shivering and naked form of the federal government. Finally in their madness they fell one upon another; each at the beginning looking merely for advantages to itself in injury to its neighbours, but as time went on seeking injury to its neighbours even as an end desirable in itself.

The thirteen states proceeded to indulge themselves in the costly luxury of an internecine tariff war. The states with seaports preyed upon their land-locked brethren, and provoked a boycott in return. Pennsylvania attacked Delaware. Connecticut was oppressed by Rhode Island and New York. New Jersey, lying between New York on the one hand, and Pennsylvania on the other, was compared to 'a cask tapped at both ends'; North Carolina, between South Carolina and Virginia, to 'a patient bleeding at both stumps.' It was a dangerous game, ruinous in itself, and, behind the custom-house officers, men were beginning to furbish up the locks of their muskets."

See also Point IV, subd. (3), *infra*.

III

The Washington statutes violate the privileges and immunities clause (Art. IV, § 2).

What we have said in reference to the Commerce Clause is equally pertinent in the present context.

As we have shown, two thousand individuals in New York are engaged in the operation of the wine industry. Thirty-nine organizations are engaged in wine production. These persons, whether natural or artificial, are, when they seek the admission of their wines to the Washington market, or to the markets of such States nearer New York as may follow Washington's example, denied the privileges and immunities which Washington producers of wine enjoy—being deprived of the right to choose outlets for its sale, to fix its price, and to promote its sales by the usual instrumentalities of industry, *e. g.*, traveling salesmen and advertising.

IV

The Twenty-first Amendment does not authorize such enactments as are here assailed.

(1)

The Twenty-first Amendment, as everyone knows, was passed to withdraw from Congress the power conferred upon it by the Eighteenth Amendment. *United States* v. *Chambers*, 291 U. S. 217 (1934). Local regulation supplanted national regulation of the liquor traffic. *Carter* v. *Virginia*, 321 U. S. 131, 138 (1944). To make certain that the power which the States had always possessed to enact what are popularly called "prohibition" laws, the authors of the amendment inserted a paragraph reading as follows:

> "Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

We submit that the quoted portion of the amendment would validate the Washington statutes if they were designed to make Washington a "dry" State and protect its

citizens from the evils of excessive alcohol consumption. The commerce clause and the privileges and immunities clause have never been held to invalidate State legislation designed for the lofty purpose of promoting the health, safety, morals and general welfare of the people by controlling the use of alcoholic beverages.

But the Washington statutes do not seek to re-establish the joyless asceticism of liquor prohibition. They place no impediment to the free flow of hard liquor into the State, doubtless because little or no whiskey is distilled within the State (or so we are informed). Washington does not declare that its citizens may not purchase and consume wine. Its use is unrestricted, provided it is the product of Washington wineries. If other wines are desired, trade barriers must be climbed over, and artificially high prices paid.

Since the statutes do not prohibit the use of wine, but aim to make it flow more freely *within the State* by helping Washington grape growers to flourish behind protective tariff walls, the legislation is not saved from conflict with the commerce clause and the privileges and immunities clause by a constitutional amendment passed *al[illegible] intuitu*.

Furthermore, we submit that the Washington statutes do not make unlawful the "delivery or use therein of intoxicating liquors", within the meaning attributable to those words as used in the Twenty-first Amendment. On the subject of deliveries, all that Washington has enacted is not that the merchandise shall stop at the State line, but merely that deliveries must be made to the State monopoly or control board and not to private license holders. Wash. Rev. Code, 66.24.210, quoted in Appendix A to the Complaint, p. iii. This being so, we contend that the Twenty-first Amendment does not bar the relief prayed for in the complaint.

Less than three years after the Twenty-first Amendment had become the law of the land, this Court decided *State Board of Equalization of California* v. *Young's Market Co.*, 299 U. S. 59 (1936). The very title of the case shows that the Court was dealing with State revenues, not with the general welfare or health, for boards of equalization make revenue and the incidence of tax burdens their chief concern. The California statute, which the District Court had invalidated and which this Court restored to validity, imposed a license fee of $500 for the privilege of importing beer and a license fee of $750 for the privilege of manufacturing it locally. The plaintiffs were engaged in selling Missouri and Wisconsin beer at wholesale, and complained that the tax hindered interstate commerce. This Court held that the Twenty-first amendment made the argument worthless; and went on to say California could exclude imported beer while permitting its manufacture and sale within its borders (pp. 62-63). Since the statute imposed a license tax on local manufacturers which was larger than the tax imposed upon importers, and since the statute was attacked from within the State (and not by persons situated as are California and New York in the case at bar), much that was said about the Twenty-first Amendment assumes the quality of *obiter dicta*, particularly the statement (p. 62) that California may permit local manufacture and sale while retaining the right to prevent imported beverages from competing with the domestic on equal terms.

We strongly urge this Court to reaffirm the more latitudinarian doctrine formulated—it, too, was *dictum*—by Mr. Justice Cardozo v. *Baldwin* v. *Seelig, Inc.*, 294 U. S. 511

(1935), where, speaking for a unanimous Court, he said (p. 528):

> "In licensing or prohibiting the sale of intoxicating liquors a state does not attempt to neutralize economic advantages belonging to the place of origin."

And we further strongly urge this Court to strike down the Washington statutes because (1) they are not revenue statutes; (2) they are not "prohibition" statutes; (3) they are totally unrelated to public health, safety and general welfare; but (4) are solely designed "to neutralize economic advantages belonging to the place of origin" (*Baldwin* v. *Seelig, Inc., supra*).

Later cases arising under or construing the Twenty-first Amendment are not hostile to our contentions.

In two cases "reciprocity" statutes were upheld. *Indianapolis Brewing Co.* v. *Liquor Control Commission,* 305 U. S. 391 (1939); *Finch & Co.* v. *McKittrick,* 305 U. S. 395 (1939). In *Mahoney* v. *Triner Corp.,* 304 U. S. 401 (1939), it was held that Minnesota could exclude liquor containing more than 25% of alcohol by volume, unless it bore a brand name registered in the Patent Office of the United States, obviously a health measure aimed against inferior liquors injurious to health.

We have found no case extending the protection of the Twenty-first Amendment to a statute adopted from economic motivations alone.

(3)

Two associations have been active in the liquor industry in the United States. One is the National Conference of State Liquor Administrators and the other is the National Alcoholic Beverage Control Association. In 1952 these

two bodies published a report of their Joint Committee and entitled it *Trade Barriers Affecting Interstate Commerce in Alcoholic Beverages.* Under the arresting caption, "Perversion of High Purposes Denounced", the Report states (p. 12):

> "Under the 21st Amendment, each state has the right to determine what is needed in the way of regulation and control of the alcoholic beverage businesses within its borders to protect the health, welfare, safety and morals of its people.
>
> As recorded in our first report, we found that 'alcoholic beverage control should be commensurate with its purposes.' *It is significant that nowhere has it ever been expressly stated or even implied that a purpose of control is to protect home industry or agriculture from out of state competition.* Yet it is evident that by statute, rule and regulation individual states have attempted to justify measures that contribute nothing to control. This, we find, is a perversion of the high purposes and sound logic of state control and we denounce it unequivocally.
>
> We believe that the purposes of the 21st Amendment to vest complete control of the alcoholic beverage industries in the individual states must not be distorted by legislative enactments or judicial interpretations, and that the states should continue in possession of the rights and prerogatives of alcoholic beverage control. We are equally certain, however, that in the enjoyment and exercise of these rights the states should honestly respect the purposes of that Amendment and that in shaping control procedures they should be guided accordingly. We fear that continued refusal to limit their interference with interstate commerce to measures which are reasonably related to control and which are motivated by a bona fide desire to accomplish its proper objectives will lead ultimately to counter-measures which will adversely affect the rights of the States in the field of control." (Italics in the original.)

(4)

If this Court regards what was said in *State Board of Equalization of California* v. *Young's Market Co., supra*, as directly pertinent to the instant issues, and as hostile to our contentions, then we ask this Court to overrule it.

On principle, we regard it as a sound proposition of law to say that the Twenty-first Amendment was intended not to augment State power to new dimensions but to restore to validity the case-law of pre-Prohibition days.

Given the premise, which on this record is indisputable, that Washington recognizes wine manufacture as lawful and is bent on encouraging it as an "infant [or should we say "adolescent"?] industry", then, we submit, nothing in the Twenty-first Amendment prevents this Court from restoring to authority its own words in *Scott* v. *Donald*, 165 U. S. 58 (1897). This Court there said (p. 101):

> "It is sufficient for the present cases to hold, as we do, that when a State recognizes the manufacture, sale and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from other States; that such legislation is void as a hindrance to interstate commerce and an unjust preference of the products of the enacting State as against similar products of the other States."*

We, therefore, with great deference, ask this Court to hold, notwithstanding whatever it may have heretofore said, that neither the Webb-Kenyon Act (37 Stat. 699) nor the Twenty-first Amendment, viewed in the light of history, was adopted for the benefit of "wet" States but only for the benefit of the "dry". It was adopted to make "dry" states drier, not "wet" states wetter. The effec-

*See also *Walling* v. *Michigan*, 116 U. S. 446, 457 (1886).

ment of this distinction in *State Board* v. *Young's Market Co., supra,* destroys the weight ratio of history to logic announced by Mr. Justice HOLMES in *New York Trust Co.* v. *Eisner,* 256 U. S. 345, 349 (1921).

The exception to the Commerce Clause created to aid States which have *denounced wines and liquors as noxious* should not be extended to aid States which seek to *promote their consumption.*

(5)

We ask leave to call the Court's attention to two case-notes in the law reviews in which the editors have been so bold as to criticize *State Board* v. *Young's Market Co., supra.*

In 11 Temple L. Q. 247 (Jan., 1937), the comment was (p. 249):

> "It is submitted that to have declared the discriminatory laws unconstitutional would have attained a more desirable result. As the history of the amendment shows, the true intent of its framers was evidently to prevent the importation of intoxicants contrary to the laws enacted in pursuance of the legitimate police power of a state. There was no thought of allowing unfair discrimination by states which recognize the legality of the use of intoxicating liquor."

In 7 Geo. Wash. L. Rev. 402 (Jan., 1939), the editor, giving free rein to his imagination, wrote (p. 409):

> "It is now not without the realm of possibility that we may see one state sending ambassadors into other states seeking to barter trade treaties in respect to intoxicating liquor."

(6)

We suggest that the Twenty-first Amendment would be given its full measure of influence and effect if this Court were to hold that it was intended to preserve to the States *normal police powers*, unfettered by the limitations upon State powers which other portions of the Constitution impose. The States may still, if they wish to, denounce intoxicating liquors as *capita lupina*, and forbid their importation for use and consumption. Thus, they retain their traditional powers. "Certainly", said this Court in *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 17, 26 (1905), "the regulation of the sale of liquor is essentially a police power."

Since control over liquor importations rests on the police power, the States have never possessed (and, we maintain, did not acquire under the Twenty-first Amendment) the right to impede the importation of wines and liquors from other States for the sole purpose of aiding domestic wineries. In other words, they may not promote native wine (or liquor) enterprises, and then denounce because imported that which they cherish and foster because native. That is the very essence of the evil which the Commerce Clause was designed to stamp out. To sanction such measures would turn the clock back to colonial times, and "invite a speedy end to our national solidarity". *Baldwin* v. *Seelig, Inc.*, 294 U. S. 511, 523 (1935).

CONCLUSION

Leave should be granted to the State of California to file its complaint, and to the State of New York to file this brief *Amicus Curiae*.

March 20, 1958.

Respectfully submitted,

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APPENDIX "A"

NEW YORK CROP REPORTING SERVICE
19TH FLOOR STATE OFFICE BUILDING
ALBANY 1, N. Y.

UNITED STATES
DEPARTMENT OF AGRICULTURE
Agriculture Marketing Service

NEW YORK STATE
DEPARTMENT OF AGRICULTURE AND MARKETS
Bureau of Statistics

February 1958

SURVEY OF WINERIES AND GRAPE PROCESSING PLANTS NEW YORK STATE—1957

This report briefly summarizes the grape survey made in New York State following completion of the 1957 crop harvest. This is the fourth year that the survey has been made. The information contained in this report was obtained by contacting all wineries and processing plants licensed by the State of New York who indicated that they handled grapes. A questionnaire was sent to each of the firms involved.

All of the firms contacted returned a completed questionnaire—a continuation of the excellent cooperation experienced in previous surveys. The cooperation of these wineries and grape processors is gratefully acknowledged for without their assistance this report would not be possible.

Of the 39 firms contacted, 31 reported actually processing grapes while the other 8 firms indicated that they had either sold all of the grapes they handled as fresh grapes to other processors and fresh fruit dealers, or had handled

no grapes in 1957. The 31 firms which processed grapes reported that they had handled a net tonnage (after accounting for plant-to-plant movement) of 65,490 tons of grapes of all varieties. In 1956, a total of 102,408 tons were processed in New York State plants.

While the total tonnage of grapes handled by New York State plants was smaller in 1957 than in 1956, the quantity of grapes brought in from other states was larger than in 1956. Imports from Canada were smaller in 1957 than in 1956. The total inshipments from other states and Canada combined for 1957 exceeded the total inshipments for 1956 and made up a higher proportion of grapes handled in New York State plants than in 1956. This resulted from a sharp reduction in size of crop in New York this year compared with last year. Of the 65,490 tons of grapes taken into New York State plants for processing in 1957, 60,751 tons came from within the State, 1,312 tons were imported from Canada, and 3,427 tons came from other states. Of the 102,408 tons of grapes taken into New York State plants in 1956 97,961 tons came from within the State, 2,244 tons were imported from Canada and 2,203 tons came from other states.

In 1957, the 60,751 tons of New York grapes came from the following producing areas listed in order of importance: Chautauqua-Erie, 41,190 tons or 67.8 percent; Finger Lakes, 14,314 tons or 23.6 percent; Hudson Valley 2,542 tons or 4.2 percent; Niagara 2,403 tons or 3.9 percent; and other New York areas 302 tons or 0.5 percent.

In 1956 the 97,961 tons of New York grapes handled in New York State plants came from the following producing areas: Chautauqua-Erie, 63,767 tons or 65.1 percent; Finger Lakes 25,934 tons or 26.5 percent; Hudson Valley

4,743 tons or 4.8 percent; Niagara 2,916 tons or 3.0 percent; and other New York areas 601 tons or 0.6 percent.

The Concord variety makes up the bulk of the New York grapes processed in the State. This is also true of the grapes brought in from other states and Canada. Other leading varieties processed in the State include in their order of importance: Catawba, Delaware, Niagara, Elvira, and Fredonia.

Of the 65,490 tons of grapes processed in 1957, 50,196 tons or 76.7 percent were used to make sweet juice as the product of first utilization or primary use in the plant where the fresh grapes were received; 12,203 tons or 18.6 percent were used to make wine and 3,091 tons or 4.7 percent were used for other purposes such as stemmed and crushed, pulped, and de-seeded. In 1956, 78,566 tons or 76.7 percent were used to make sweet juice; 14,429 tons or 14.1 percent were used to make wine and 9,413 tons or 9.2 percent were used for other purposes.

Since the Concord variety made up about 89 percent of the total quantity of grapes taken into New York State plants, it is not surprising that it is the most important variety in each of the three utilization categories. With the exception of the Fredonia variety however, all other varieties were used primarily for making wine.

Average prices paid for New York grapes, as reported by wineries and processing plants are summarized in table 4, for the more important varieties. Since a large part of the Concord and Fredonia tonnage is handled on a cooperative or profit-sharing basis, no attempt was made to arrive at an average price for these two varieties in 1957.

[Statistical tables omitted]

Appendix "C".

APPENDIX "B"

Wine: Taxable withdrawals and premises operated for the fiscal year 1957, New York and United States

	Taxable withdrawals		Premises Operated	
	New York	*United States*	*New York*	*United States*
	1,000 gallons		*Number*	
Still wines	15,479	139,920	59	568
Effervescent wines	933	2,123	24	113
Vermouth	1,293	3,424	32	132
Other special nature wines	22	932	4	19

Source: U. S. Treasury Department, Internal Revenue Service annual report "Statistics" relating to the Alcohol and Tobacco Industries—Fiscal year ended June 30, 1957

APPENDIX "C"

Statistics Relating to the Alcohol and Tobacco Industries, Fiscal Year ended June 30, 1957, issued by U. S. Treasury Department, Internal Revenue Service.

Production of Wine—New York and United States—Fiscal Year 1957

	New York	*United States*
	Thousand Gallons	
Still Wines*	8,103	148,792
Vermouth	1,515	3,742
Other Special Nature Wines	51	1,198
Effervescent Wines	1,094	2,479

* Represents the amount removed from fermenters exclusive of sub-standard wines produced as distilling material for the production of brandy.

Certificate of Service

The undersigned, a member of the bar of the Supreme Court of the United States, and of counsel to the Attorney General of the State of New York who seeks to file a brief herein as *amicus curiae*, hereby certifies:

That on the 25th day of March, 1958, he served the within and foregoing "MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF COMPLAINT" upon the State of Washington, the defendant, as prescribed by Rules 9 and 33 of this Court, by depositing in the post office maintained by the United States government in The Capitol, Albany, New York, two copies of the said motion and brief, securely enclosed in an envelope, air mail postage prepaid, addressed to each of the following officials of said defendant state at his post office address as shown below:

Honorable Albert D. Rosellini,
Governor of the State of Washington,
State Capitol,
Olympia, Washington.

Honorable John J. O'Connell,
Attorney General of the State of Washington,
State Capitol,
Olympia, Washington.

At the same time he deposited in the same post office two further copies of the said motion and brief similarly enclosed with postage prepaid, addressed to each of the following officials of the plaintiff state at his post office address as shown below:

Honorable Goodwin J. Knight,
Governor of the State of California,
State Capitol,
Sacramento, California.

Certificate of Service.

Honorable Edmund G. Brown,
Attorney General of the State of California,
State Building,
San Francisco 2, California.

PAXTON BLAIR
Solicitor General of the State
of New York

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1957

STATE OF CALIFORNIA, *Plaintiff*,
v.
STATE OF WASHINGTON, *Defendant*.

No. 19
ORIGINAL

BRIEF OF THE STATE OF WASHINGTON OPPOSING THE MOTION OF THE STATE OF CALIFORNIA FOR LEAVE TO FILE A COMPLAINT

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1957

STATE OF CALIFORNIA,	*Plaintiff*,	No. 13 ORIGINAL
v.		
STATE OF WASHINGTON,	*Defendant.*	

BRIEF OF THE STATE OF WASHINGTON OPPOSING THE MOTION OF THE STATE OF CALIFORNIA FOR LEAVE TO FILE A COMPLAINT

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IN THE

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OCTOBER TERM, 1957

STATE OF CALIFORNIA, *Plaintiff*,
v.
STATE OF WASHINGTON, *Defendant*.
No. 13 ORIGINAL

BRIEF OF THE STATE OF WASHINGTON OPPOSING THE MOTION OF THE STATE OF CALIFORNIA FOR LEAVE TO FILE A COMPLAINT

Comes now the State of Washington and respectfully files its brief in opposition to California's motion for leave to file a complaint herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions in addition to those cited by California:

Eleventh Amendment to the United States Constitution:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Article 20, Section 22, paragraph 1 of the California Constitution (as amended effective January 1, 1957).

> "The State of California * * * shall have the exclusive right and power to regulate the importation into and exportation from the State, of alcoholic beverages. *In the exercise of these rights and powers, the Legislature shall not constitute the State or any agency thereof a manufacturer or seller of alcoholic beverages.*" (Emphasis supplied)

The following numbered sections of the California Agricultural Code: 1300.15 (a) (1); 1300.15 (a) (2); 1300.16 (a) (1); 1300.16 (a) (2); 1300.16 (c); 1300.17 (f). These provisions are set forth in Appendix A.

In addition to the above provisions defendant desires to cite the recent decision of *Land O'Lakes Creameries, Inc. v. Louisiana State Board of Health*, decided February 21, 1958, by a three judge court of the Eastern District of Louisiana. Inasmuch as this decision has not yet been reported, the complete decision is incorporated in this brief as Appendix B for the reason that the opinion determines many of the identical issues presented in this action.

COUNTER-STATEMENT OF CASE

Washington is aware that the allegations of California's complaint must be taken as true in the same sense that a demurrer admits the truth of all well pleaded allegations of a complaint.

It is appropriate, however, briefly, to clarify two erroneous impressions of fact cleverly created by the incomplete statement of the case as contained in the complaint. The clarification is not a denial of any well pleaded fact nor is it an unpermitted counter-allegation of fact but is directed merely against erroneous impressions of fact which might be derived from a reading of the complaint.

1. Washington Statutes and Regulations Do Not Legally Limit Any Wine Promotional Activities of California State Agencies.

In sub-paragraphs 38 (a) and 39 through 46 of its complaint, California implies, but does not allege, that the Washington statutes and regulations of the State liquor control board operate directly to restrict or prohibit wine promotional activities of the California director of agriculture and the wine advisory board. Such an impression is false. The California wine advisory board is free under Washington law to engage in all its promotional activities since it does not and cannot promote any particular brand of wine. In the argument hereunder the appropriate California and Washington statutes clearly establishing this fact will be cited to the Court.

2. The Maximum Potential Effect of Alleged Washington Practices Are of No Significance to California's Grape and Farm Economy and Little Significance to Its Wine Industry.

California in its complaint (Pl. Comp. 4, 7, 8, 10, 28, 29, 30) has set forth statistical data relating

to the magnitude of its farm and grape economy and its wine industry. There is created an impression that alleged Washington practices relating to the sale of wine within its borders has a serious impact on the economy of California because of the magnitude of its farm-grape-wine economy. As will be demonstrated in the argument hereunder, California's own statistics together with data of which this Court may take judicial notice, prove the contrary to be true. Even if California wineries were to preempt the Washington wine market, the effect on California's agricultural economy would be infinitesimal; the effect on the grape-wine industry would be negligible. The only interest of the slightest magnitude herein involved is the pecuniary interest of a small number of private wineries in California.

SUMMARY OF ARGUMENT

I. The Eleventh Amendment to the Federal Constitution prohibits all suits against a State by or *for* citizens of other States. *New Hanpshire v. Louisiana*, 108 U. S. 76. The purpose of this action is to void Washington statutes and regulations which restrict the sale of wine imported into Washington. The real parties in interest are the California wineries and therefore California has no standing to maintain this suit.

A. California asserts a governmental interest in this action through the activities of its director of agriculture and its wine advisory board in advertising and promoting California wines. It is argued

that these functions and those of the wine industry are inseparable.

1. Washington statutes and regulations do not restrict or limit activities of the wine advisory board. The regulations are directed against private producers' advertising and canvassing activities. The activities of the State of California are outside Washington's regulations since these official activities may not promote any particular brand or trade name and under the California Constitution, Article 20, Section 22, no agency of the State may be a seller of alcoholic beverages. These two provisions make official promotional activities of California clearly separable from those of private producers who promote their own particular brands and are engaged in selling wine. In its final analysis California's only complaint with reference to its governmental activity is that private wholesalers in Washington may not handle California wines and therefore have no economic motive in distributing California wine advisory board advertising materials. This indirect minimal effect of Washington statutes upon activities of California's wine promotional program does not create a state interest in this action sufficient to justify this Court assuming original jurisdiction of this suit.

2. This case is not unique. Oklahoma statutes directing that State's Bank Commissioner to take over assets of insolvent state banks, marshal the assets thereof, and sue to enforce the liability of stockholders represents comparable State activity

and interest to that asserted by California in this case. Notwithstanding arguments identical to those of California made by Oklahoma, the Court refused jurisdiction in *Oklahoma v. Cook*, 304 U. S. 387.

B. The California legislature's declarations and resolutions regarding State interest in the wine industry cannot confer on this Court original jurisdiction of this action. California has relied upon one statute of its agricultural code (1300.10 (c)) declaring marketing of wine to be affected with a public interest and invoking state police powers. The statute by its express wording is applicable only to marketing of commodities within the State of California and has no application to this action. The other section of its code declaring as a purpose of the agriculture act to provide means of eliminating trade barriers against (wine) must be considered in the light of this Court's pronouncements that jurisdiction is not conferred merely because a State elects to make itself a party when it seeks not to protect its own property but "only to vindicate the wrongs of some of its own people." *Oklahoma v. Atchison, T. & S. F. Ry.*, 220 U. S. 277.

In the light of a recent California decision there is serious doubt that that State has any police power authority to promote the sale of private wine. *People v. Asamoto*, 131 C. A. (2d) 22.

C. California has stated no facts in its complaint which justify it to sue in its quasi-sovereign capacity.

1. Although California has well demonstrated the importance of agriculture to its overall economy and has proved the preeminence of its wine industry among the States of this country, it has completely failed to state any facts showing any substantial injury to either its agriculture or wine industry caused by Washington liquor regulations. Using California's figures and certain additional information of which this Court may take judicial notice, it appears that grape growing comprises little over 4% of California agriculture. Assuming for purposes of illustration only that California would preempt the Washington wine market, the increase in sales would be only eighty-seven hundredths of one per cent. This maximum increase would represent only forty-four hundredths of one percent of present grape production. The effect on California agriculture as a whole would be only eighteen one-thousandths of one per cent. Actually California has not alleged facts sufficient to show any injury even to the wine industry. *Alabama v. Arizona*, 291 U. S. 286.

2. The decisions of this Court do not support California's assertion that it is entitled to maintain this action in the capacity of quasi sovereign. The cases in which this Court has assumed jurisdiction under this theory lay down strict requirements for finding quasi sovereign interest in a state to maintain such an action. In summary these decisions hold that there must be a genuine sovereign interest in the plaintiff state usually with respect to invasions of its

own territory in a physical sense. Uniformly it is held that the injury be to all or a substantial portion of the State's citizens, that the threat be to the health, safety or general welfare of the people of the State and that the invasion be of serious magnitude. California suing on behalf of a small number of wine producers meets none of these tests. This action finds its parallel in a number of decisions holding that a State cannot invoke the original jurisdiction of this Court when in reality the suit is prosecuted for the benefit of certain individuals even though the State may assert an economic interest in the claims and declares their enforcement to be a matter of State policy.

II. This action has been commenced in the wrong forum by the wrong party plaintiff. The real parties in interest, the California wineries may bring an appropriate action in a Federal district court against the Washington State liquor control board to enjoin the enforcement of Washington Liquor laws.

It is a fundamental principle of this Court that its original jurisdiction over controversies between States is of so delicate and grave a character that it will not be exercised "save when the necessity (is) absolute and the matter itself properly justiciable." *Louisiana v. Texas*, 176 U. S. 1.

III. Substantive Questions

A. California has failed to state a justiciable controversy under the privileges and immunities

clause of Article IV, Section 2; the Commerce Clause of Article I, Section 8; or the Equal Protection Clause of the Fourteenth Amendment.

B. 1. This action if it may be maintained at all is brought by the State of California in its quasi-sovereign capacity separate and independent of the rights of individual citizens. The rights guaranteed by the Privileges and Immunities Clause of the Constitution are personal to *natural persons.* California as a sovereign State is not a person within its protection. The privileges and immunities of citizenship are personal to the citizens and may not be assigned to any other person natural or artificial. California cannot invoke this clause of the Constitution as it is not within the class of persons "with respect to whom the act is (allegedly) unconstitutional." *Heald v. District of Columbia,* 259 U. S. 114.

2. The privileges and immunities protected by Article IV, Sec. 2 do not encompass each and every right, power or privilege of a citizen. They are confined to the basic and essential rights of a citizen. The business of dealing in intoxicating liquor is not one of the privileges and immunities protected by this clause. Since the business of dealing in intoxicating liquor is not such a privilege or immunity, this clause cannot successfully be argued to challenge State laws regulating the business of intoxicating liquor.

3. The effect of the Twenty-First Amendment is to return to the States the power and authority to

regulate the transportation and the importation of intoxicating liquor into the jurisdictional confines of the State free from the effect of the Privileges and Immunities Clause. The effect of the Twenty-First Amendment is to return to the States the authority they originally had prior to the adoption of the Constitution over the importation and transportation of intoxicating liquor into their borders. It has been decided that by the plain wording of the amendment the Commerce Clause has no application to this matter. Neither has the equal protection clause. The Privileges and Immunities Clause is as important to the "theme of economic unity" as these. As far as the Twenty-First Amendment is concerned, the Privileges and Immunities Clause is in the same category as the Commerce Clause and the Equal Protection Clause.

C. The plain wording of the Twenty-First Amendment exempts State laws regulating transportation and importation of intoxicating liquor into a State from the effect of the Commerce Clause. This is true whether the State law or regulation amounts to a "burden" on commerce or whether the state law or regulations clearly discriminate against interstate commerce. The validity of such laws is upheld irrespective of whether or not their purpose is to protect public safety, health and morals.

D. The Twenty-First Amendment exempts State Laws dealing with the transportation and importation of intoxicating liquor from the effect of the

Equal Protection Clause. Once again State laws and regulations in this field are valid whether or not they pertain to public health, safety or morals.

ARGUMENT

I.

THE STATE OF CALIFORNIA HAS NO STANDING TO MAINTAIN THIS ACTION AND IS NOT THE REAL PARTY IN INTEREST.

> " * * * The evident purpose of the [Eleventh] amendment, so promptly proposed and finally adopted, was to *prohibit all suits against a State by or for citizens of other States*, or aliens, without the consent of the State to be sued, and, in our opinion, *one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution*, by assuming the prosecution of debts owing by the other State to its citizens * * * " (emphasis supplied) *New Hampshire v. Louisiana*, 108 U. S. 76, 91.

It is significant that California has not cited to this Court the Eleventh Amendment to the Constitution. An examination of the Washington statutes and regulations whose enforcement California seeks to enjoin (Pl. Comp. 13-20) shows that in each instance the restriction imposed is directed solely to sales of wine by private individuals (California wineries) and that in no instance is any legitimate activity of the State of California or any agency thereof proscribed. California has claimed no proprietary interest in the suit nor any pecuniary interest of any kind. This is an action solely on behalf of the privately owned wineries located in California.

In these circumstances Amendment Eleven governs the jurisdiction of this court:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

California seeks to avoid the impact of the amendment by setting up "quasi-sovereign" rights in the action in three respects: first, that its governmental functions are involved; second, that its legislature has directed the action; and third, that it seeks to protect its ecenomy.

A careful study of the facts alleged by California and a systematic analysis of the decisions of this Court bearing on its original jurisdiction will show that California lacks standing to maintain this action under any of these theories.

The three categories of quasi-sovereign rights claimed will be considered separately.

A. California Has No Governmental Interest to Justify This Action on Behalf of Private Wine Producers Located in California.

California has summarized the first right to bring this action as follows:

> "Legitimate governmental functions of the state of California are directly affected and restricted by the Washington statutes and regulations complained of." (Pl. Br. 14).

1. Washington Does Not Restrict Advertising Activities of the State of California.

We may first consider the nature of the restrictions against California's governmental functions. The governmental activities referred to are the advertising campaigns and sales promotional activities of the California director of agriculture and the California wine advisory board designed to "maintain present markets or to create new or larger markets for * * * (wine produced) in the State of California." Calif. Agric. Code, Section 1300.15 (b) (8); *cf.* Marketing Order for Wine (Pl. Comp. 23). Sales promotional activities mentioned in plaintiff's complaint include (1) preparation and distribution of "point-of-sale" materials (Pl. Comp. 25), (2) exhibition of motion pictures depicting the California wine industry and promoting use of its products (Pl. Comp. 25), and (3) wine training classes of various types (Pl. Comp. 26). The plaintiff's complaint and brief would have the Court believe that Washington statutes and regulations restrict or prohibit these activities. For instance in describing generally its advertising campaign to promote wine sales, California alleges:

> "* * * It carries on these activities in every state of the United States which does not prohibit by its own laws, the sale and consumption of wine as a beverage and which permits advertising and promoting the sale of wine." (Pl. Comp. 23).

But, of course, Washington statutes and regulations do not prohibit or restrict the advertising and

promotion of wines by the California wine advisory board. The only Washington statutes even closely related to such activity are R.C.W. 66.08.060 (Pl. Comp. App. A, p. ii) which prohibits *the Washington State Liquor Control Board from advertising* and authorizes that board to adopt reasonable regulations relating to liquor advertising; R.C.W. 66.28.050 (Pl. Comp. App. A, p. iv) prohibiting *canvassing or taking orders for the purchase or sale of liquor.* The only related regulation of the state liquor control board is Revised Rules and Regulations (113) (d) (Pl. Comp. App. A, p. vii) which concerns *solicitation of liquor sales by manufacturers, wholesalers or distributors or their agents.*

These statutes and regulations leave the California wine advisory board free to disseminate their advertising and conduct their wine promotional activities since the California statute requires that the program shall be directed toward increasing the sale of California wine "without reference to a particular brand or trade name." *Calif. Agric. Code Section 1300.15 (b) (8)* (Pl. Br. 18).

Conclusive proof that California is not and cannot be engaged in selling the wine of any producer is found in the California Constitution, Art. 20, Sec. 22, which provides in part:

> "The State of California * * * shall have the exclusive right and power to regulate the importation into and exportation from the State, or alcoholic beverages. *In the exercise of these rights and powers, the Legislature shall not constitute the State or any agency thereof a*

manufacturer or seller of alcoholic beverages." (Emphasis supplied)

Accordingly the Washington statutes and regulations in no way restrict activities of the wine advisory board which promote no particular brand and which involve no selling of wine.

In making this point, we do not wish to be understood as merely raising a question as to the technical sufficiency of California's pleading. The matter would not be emphasized if California were not in fact free to conduct promotional activities and indeed had it not so fully exercised its privilege to do so.

Of course all liquor advertising is subject to liimted regulations which is equally applicable to foreign and domestic alcoholic beverages. But except for this general regulation applicable to all liquor advertisements there is no Washington statute or regulation restricting the promotional activities of the California wine advisory board. Nor has California complained of any restrictions imposed on it by officials of the Washington State liquor control board acting in excess of their authority. At page 32 of plaintiff's brief it is said:

> "There is no question here of the maladministration of state laws by an irresponsible or unauthorized official. * * *"

What then is the complaint of California as it pertains to functions of its wine advisory board? It is solely that *private wholesalers* in Washington are not permitted to distribute California wines and

as a result have no economic interest or purpose in disseminating advertising materials or otherwise assisting the promotional activities of the California wine advisory board. It is this tenuous link between Washington's regulation of imports from *private wineries* and the quasi-governmental functions of the California wine advisory board upon which California must rely in its claim of governmental interest. But this straw cannot support the invocation of the original jurisdiction of this Court sought in reality on behalf of private California wine producers. In reply to a similar contention, this Court said in *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237, in discussing Georgia's right to maintain an original action to enjoin the pollution of its air:

> "The alleged damage to the State as a private owner is merely makeweight, and we may lay on one side the dispute as to whether the destruction of forests has led to the gullying of its roads." (Emphasis supplied.)

And in *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 450, wherein Georgia asked leave to file its complaint to enjoin a rate fixing conspiracy of twenty railroads, the asserted interest of the state as owner of a railroad and as owner and operator of various institutions was dismissed in the same manner, the Court saying:

> "* * * as in *Georgia v. Tennessee Copper Co.*, *supra*, p. 237, we treat the injury to the State as proprietor merely as a 'makeweight' * * *"

Or consider the greater and more direct interest of Alabama in the interstate sale of convict made goods *by the state* in *Alabama v. Arizona*, 291 U. S. 286. This Court in denying leave to Alabama to file its complaint to enjoin statutes of five states which prohibited such sales held:

> "* * * The facts alleged are not sufficient to warrant a finding that the enforcement of the statutes of any defendant would cause Alabama to suffer great loss or any serious injury. If filed, the bill would have to be dismissed for want of equity. *Florida v. Mellon*, 273 U. S. 12."

California's so-called State activities are not restricted by Washington laws. Under the cited authority it cannot be supposed that any indirect effect Washington statutes may have upon such activities can be dignified as even a "makeweight" injury to the State.

2. California Wine Promotional Activities and the Prosecution of This Action Are Activities on Behalf of Private Persons.

Plaintiff would have the Court believe that this is a case of first impression, entitled to unusual consideration. It is said "This case is unique * * * None of the prior decisions of this Court concerning its original jurisdiction have involved any comparable activity on the part of the complaint state." Defendant has overlooked *Oklahoma v. Cook*, 304 U.S. 387. A comparison between the State activities of California and Oklahoma shows a striking parallel. *But the state activity in each case as well as the*

action brought in this court is on behalf of particular individuals which is insufficient basis for invoking the original jurisdiction of this Court.

To demontstrate the essential similarity between the two cases it is first necessary to examine the California agricultural code. Establishment of a marketing order such as the wine marketing order is not a self-operating governmental function but requires "voluntary" action of persons producing or persons handling a majority of the product for which the marketing order is issued.

Sections 1300.16 (a) (1) and 1300.16 (a) (2) provide that marketing orders affecting handlers shall not become effective unless assented to in writing by handlers, handling at least sixty-five per cent of the volume of the product and by sixty-five per cent of the number of handlers; marketing orders affecting producers shall not become effective unless assented to in writing by more than a majority of producers and by producers who produce a majority of the volume of the product.

Section 1300.16 (c) provides for termination of any marketing order by a request in writing by more than forty per cent of producers or handlers who produce or handle more than forty per cent of the volume of the commodity.

Section 1300.15 provides in part:

> "Any marketing order issued pursuant to this chapter shall provide for the establishment of an advisory board * * * If the marketing order affects directly only producers of a particular commodity *the members of the board*

> *shall be producers.* If the marketing order affects directly only handlers of a particular commodity *the members of the board shall be handlers.* If the marketing order affects directly both producers and handlers of a particular commodity, *such board shall be composed of both producers and handlers* * * *" (1300.15 (a) (1) (Emphasis supplied.)

This advisory board, subject to the approval of the director of agriculture, develops administrative rules and regulations, processes complaints of violation, develops amendments to the marketing order, assists in assessing industry members and collecting funds necessary to cover expenses. (1300.15 (a) (2)).

With respect to the advertising acivities with which this action is concerned, Section 1300.17 (b) provides that the advisory board shall recommend budgets to cover expenses and the assessment rate neccessary to provide suffiicent funds for advertising and sales promotion plans.

Section 1300.17 (f) provides for the deposit of funds collected from assesments in separate bank accounts and further provides:

> "any moneys remaining in such fund * * * may be refunded at the close of any marketing season upon a pro rata basis, to all persons from whom assessments were collected, * * *"

In summary it may be observed that the statutory scheme is to make the director of agriculture an agent for producers and handlers of various agricultural products. The marketing order becomes effective only upon the assent of the individual pro-

ducers and handlers. The same persons finance the program through assessments largely determined by their own representatives on the advisory board. The money thus collected is held in a separate non-treasury account and moneys left unexpended at the close of a marketing season may be refunded to those who have contributed. The conclusion that this legislation and the marketing order before the court is solely for the benefit of individual, identifiable members of the wine industry cannot be avoided. Perhaps the best characterization of the "state functions" here involved is found in plaintiff's brief at page 18 where it is frankly stated:

> "The wine sales promotion activities of the State are those of a commercial or industrial organization promoting nation-wide sales of its products, or of a trade association of such organizations * * *"

The character of California's "governmental" activity on behalf of its wine producers has been examined in detail in order that a full comparison may be made with the governmental activities of Oklahoma in behalf of depositors and creditors of its state banks in *Oklahoma v. Cook, supra.*

In that case the State of Oklahoma asked leave to file a complaint in this Court to enforce the statutory liability of a shareholder of an insolvent state bank. The action was commenced by the State on relation of its bank commissioner in pursuance of Oklahoma statutes. The pertinent statutes as set out in the opinion of this Court provided:

"* * * the shareholders of every bank

organized under the state law 'shall be additionally liable for the amount of stock owned.' Okla. Stat. 1931, § 9130. The Bank Commissioner, when satisfied of the insolvency of a bank, may take possession of its assets and 'proceed to wind up its affairs and enforce the personal liability of the stockholders.' Id. § 9172 * * * The Bank Commissioner is authorized to 'prosecute all siuts necessary for the liquidation of the assets of the insolvent corporations taken over by him' and such suits are to be brought 'in the name of the State of Oklahoma, on the relation of the Bank Commissioner'. If, after liquidation and payment in full of depositors and creditors, any assets remain in the hands of the Bank Commissioner, they revert to the stockholders. Id. § 9173.

"The statutes further provide that 'The State of Oklahoma on the relation of the Bank Commissioner, shall be deemed to be the owner of all of the assets of failed banks in his hands for the use and benefit of the depositors and creditors of said bank.' Id. § 9179 * * *"

The Oklahoma Supreme Court had construed these statutes in *State ex rel. Murray v. Pure Oil Co.*, 169 Okla. 507, 37 P. (2d) 608. A portion of that decision which nearly paraphrases California's contentions in the instant action was quoted by this Court.

"The protection of depositors of insolvent state banks is a distinct economic policy of the state. * * * In so far as the object of this action is to further the established economic policy of the state, the state may be said to have a real interest created by its governmental policy, as distinguished from a mere nominal interest, even though the pecuniary benefits of the litigation, if ultimately successful, go to the depositors and creditors of the insolvent bank."

This Court in considering its own jurisdiction in the case held:

> "* * * [It is not] enough that a State has acquired the legal title to a cause of action against the defendant, where the recovery is sought for the benefit of another who is the real party in interest. *New Hanpshire v. Louisiana, New York v. Louisiana*, 108 U. S. 76 * * *
>
> "The underlying point of the decision was that in determining the scope of our original jurisdiction under Clause 2 of § 2 of Article 3 of the Constitution, *we must look beyond the mere legal title of the complaining State to the cause of action asserted and to the nature of the State's interest.* * * *" (emphasis supplied).

This Court then considered the concept of quasi-sovereign interests of a state which might entitle it to maintain an original action and declared:

> "But this principle does not go so far as to permit resort to our original jurisdiction in the name of the State but in reality for the benefit of particular individuals, *albeit the State asserts an economic interest in the claims and declares their enforcement to be a matter of state policy.* * * *" (emphasis supplied)

California's assertion that:

> "None of the prior decisions of this Court concerning its original jurisdiction have involved any comparable activity on the part of the complainant state."

cannot be justified in view of *Oklahoma v. Cook*. In each case a state administrative officer acting under a statutory scheme is engaged in activities on behalf of an identifiable group of state citizens. In each case the state claims an economic interest in its pro-

gram but the true nature of the relief sought is the benefit of particular individuals. It should be noted further that both (1) the general state programs (marshalling of assets in the one case and advertisement of wine in the other) and (2) the actions brought in this Court, are for identical groups of identifiable persons. The only principle difference is that in the instant case the real parties in interest not only finance the program but have large measure of control over it as well. Whereas, the Bank Commissioner of Oklahoma operated under a general state statute, the director of agriculture and the California wine advisory board operate a program in the nature of a "commercial or industrial organization promoting nation-wide sales of its products, or of a trade association of such organizations. * * *" (Pl. Br. 18).

B. Jurisdiction of This Court to Hear This Action Cannot Be Conferred by Resolutions and Declarations of the California State Legislature.

California has placed much reliance upon certain legislative declarations contained in its agricultural marketing act and indeed even upon a declaration of the current wine marketing order. (Pl. Br. 24)

Section 1300.10 (c) cited at page 24 of plaintiff's brief (but not quoted) deserves some careful examination. The section provides:

> "*The marketing of agricultural commodities within this State* is hereby declared to be affected with a public interest. The provisions of this chapter are enacted in the exercise of

> the police powers of this State for the purpose of protecting the health, peace, safety and general welfare of the people of this State." (Emphasis supplied.)

We do not profess to understand why this section has been cited to this Court since by its express language it applies to the marketing of commodities *within the State of California.* This action involves the marketing of wine *outside the State of California.*

Section 1300.11 (d) declares one purpose of the chapter to be:

> "(d) To provide methods and means * * * for the prevention, modification or elimination of trade barriers which obstruct the free flow of such (California wine) to market."

The State of Washington with all due respect to the legislature of California and conceding that the declarations of that body should be given proper weight, nonetheless must note that this Court has consistently refused to permit either the attorney general or the legislature of any state to define or determine its original jurisdiction.

In the case of *New Hampshire v. Louisiana,* 108 U. S. 76, provision was made in the Statutes of both New Hampshire and New York for assignment to the State of the obligations of another State. It then became the duty of the attorney general if he believed the claim to be valid to bring suit in the name of the State to collect on such obligations. The moneys thus collected were then paid to the assignor of the claim. Pursuant to these statutes and the assign-

ment of Louisiana bonds to the two States, bills were filed in this Court to enforce collection. The Court held that,

> "* * * in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens. * * *"

And see *Oklahoma v. Cook*, 304 U. S. 387, reviewed above to the same effect.

In *Oklahoma v. A., T. & Santa Fe Ry.*, 220 U. S. 277, 289, although no State statute was involved, the Court firmly determined to reserve to itself the interpretation of its original jurisdiction under the Constitution. It was there stated:

> "We are of opinion that the words in the Constitution conferring original jurisdiction on this court in a suit 'in which a State shall be a party' are not to be interpreted as conferring such jurisdiction in every cause in which the State elects to make itself strictly a party plaintiff of record, and seeks not to protect its own property, but only to vindicate the wrongs of some of its people, or to enforce its own laws or public policy against wrongdoers generally."

In *Land O'Lakes Creameries, Inc. v. Louisiana State Board of Health*, (Def. Br. App. B. p. 6) the State of Minnesota sought to intervene in an action by Minnesota dairy product manufacturers to have a Louisiana statute affecting the labelling of dried milk declared unconstitutional. The Minnesota Attorney General relied upon Chapter 840 of the Laws of Minnesota for 1955 which provided:

"The attorney general is authorized to take such action as he deems necessary in order to contest or oppose existing statutes, ordinances, regulations, orders or other trade barriers which may restrict the sale in other states of milk or other dairy products produced in Minnesota; * * *"

The Court there held:

"* * * However binding that statute may be on the courts of Minnesota, its effect can be little more than persuasive on other courts. Unquestionably, the fact that the legislature of Minnesota has indicated its interest in the dairy industry should be accorded great weight. Also to be considered, however, is the advisability of allowing the Attorney General of Minnesota to range at large in courts of other states, and of the United States, seeking to have declared unconstitutional laws passed by the legislatures of those states."

The motion to intervene was denied.

The declaration of the California legislature that marketing of agricultural commodities is affected with a public interest and that the provisions of the chapter were enacted pursuant to the police power of the state have been denied in one instance even by an appellate court of California. *People v. Asamoto*, 131 C. A. (2d) 22, 279 P. (2d) 1010 (Dist. Ct. of App. 2nd Dist., Div. 1, 1955). The California court in declaring a marketing order for bedding plants invalid said:

"Recognizing the limitations upon the exercise of the police power for regulatory purposes in that it may be invoked only where the commodity or service sought to be regulated is

affected with a public interest and regulation is for the purpose of protecting the health, peace, and safety and general welfare of the public, the legislature expressly declared in section 1300.10 of the Agricultural Code that: [quoting section 1300.10 (c) set forth hereinabove].

"*But the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified.* * * *" (Emphasis, the court's)

The court then examined the marketing order and found it was not "*essential to the agriculture of the State*" (emphasis ours) and declared it invalid. The Attorney General of California apparently decided not to appeal the decision and no other reported case has construed these pertinent sections of the Agricultural Code. Under the tests announced in the *Asamoto* case the wine marketing order before this Court may well be an invalid order.

C. The Economic Welfare of California Wineries Is an Insufficient State Interest to Enable California to Sue in a Quasi-Sovereign Capacity.

California, lacking any direct property or pecuniary interest herein, asserts that this action is brought for the purpose of fulfilling its responsibility to make secure the general welfare and prosperity of its people. In our reply we first examine the economic facts upon which the claim is based and then review the decisions of this Court bearing on this concept of State interest as a basis for invoking the original jurisdiction of this Court.

1. Washington Statutes Regulating Wine Imports From California Have No Significant Impact Upon the California Economy.

The relevant facts are those which tend to disclose the economic effect that Washington liquor regulations may have upon the California economy. California has failed to allege all the facts necessary for this consideration. We therefore ask the Court to take judicial notice of certain statistical material contained in (1) World Almanac 1958, Edition and (2) the California Blue Book, 1954 published pursuant to the provisions of the California Government Code, Section 13606 and Chapter 1573, statutes of 1953. *Parker v. Brown*, 317 U. S. 341, 363. The Blue Book contains the latest authoritative statistics on California agriculture, officially published, available to defendant. The Blue Book will be cited (B. B. ——).

First it is important to note the relative importance of grape production to overall California agirculture. California alleges that the dollar value of grape production in 1956 was $126,000,000. (Pl. Comp. 29.) The value of the total cash farm income the same year was $2,813,263,000. (World Almanac 1958 Edition, p. 657.) Thus the income from grape production was 4.5% of cash farm income for 1956. This corresponds closely to 1953 figures. In that year the value of the total cash farm income was $2,608,-451,000 (B. B. 589), while the value of the grape crop was $106,543,000 (B. B. 590), or 4.1% of the cash farm income.

In order to determine the maximum beneficial effect to California of voiding Washington liquor control laws and regulations, we assume for the moment that every Washington winery will be destroyed and California will double its 45% share of Washington's market (Pl. Comp. 4) to 90% of that market. We assume that California's 1956 Washington wine sale of 996,000 gallons (Pl. Comp 10) will increase by 1,000,000 gallons. Since California's average annual production of wine is 115,000,000 gallons (Pl. Comp. 30) the assumed increase in wine sales would be .87%. (Eighty-seven hundredths of one per cent.)

The total maximum effect upon the grape industry would be 40% to 60% of this figure since from 40% to 60% of the California grape crop is processed into wine. (Pl. Comp. 28). Thus the maximum effect on grape production would be .35% to .52% or an average of .44% (forty-four hundredths of one per cent).

Of greatest significance for the purposes of this case, the total maximum effect would be .44% of 4.1% of the total California farm economy (see page 28 above) or .018% (eighteen one-thousandths of one per cent).

Of course, there is no basis in law or fact for the assumption that California wines would preempt the Washington market. The above figures are based upon maximum theoretical assumptions in which this Court would not indulge. The purpose of mak-

ing such an assumption here is simply to illustrate that *the object of this suit is not to protect the general welfare and prosperity of the people of California* but rather to *expand* the market for the products of a small number of California wineries who through assessments have paid the cost of this action.

Actualy the allegations of plaintiff's complaint are insufficient to establish any injury even to the wine industry if the tests of *Alabama v. Arizona*, 291 U. S. 286, 292, are applied. There this Court held:

> "* * * [Alabama's bill] *fails to show that Alabama has any agreement with any de-defendant* [for the sale of convict made goods] or that there is any direct issue between them or that the validity of the statutes in question and Alabama's assertion of right may not, or indeed will not, speedily and conveniently be tested by the contracting company that apparently is directly concerned, or by a seller of such goods. *Cf. Louisiana v. Texas, supra*, 18, 22. *There is no allegation that an adequate market for the goods in question may not be found outside the five states named.* The facts alleged are not sufficient to warrant a finding that the enforcement of the statutes of any defendant would cause Alabama to suffer great loss or any serious injury. * * *" (Emphasis supplied.)

2. Legal Authority Denies California's Claim of Capacity to Bring This Suit as Quasi-Sovereign.

If the argument in California's brief seems to suggest even a possibility that prior decisions of this Court contain authority for filing its complaint based upon the facts therein alleged, a review of those decisions denies that contention. The concept of a

State suing in its capacity as quasi-sovereign or in the relation of *parens patriae* to its citizens has received exhaustive consideration by this Court. The cases in which States have been permitted to sue in this Court in such capacity are wholly dissimilar to this one.

Decisions permitting States to sue in a quasi-sovereign capacity are based upon a genuine sovereign interest of the State, usually with respect to invasions of its own territory in a physical sense from another State through the agency of natural laws. The uniform requirements of such actions include injury or threatened injury to all or a substantial portion of the State's citizens; that the threat be to the health, safety or general welfare of the people of the State; and, most important, the principle uniformly adhered to, that the invasion be of serious magnitude.

California's case meets none of these requirements. A brief synthesis of the important decisions on the point, illustrates the stringent requirements the Court has set down.

Boundary disputes between States involving the question of territorial sovereignty in its purest form were early held to be controversies between states. *New Jersey v. New York*, 5 Pet. 285; *Rhode Island v. Massachusetts*, 12 Pet. 657. Later the court entertained controversies between states respecting diversions of interstate streams and creation of public nuisances.

A reading of the decisions in the first class shows that jurisdiction has rested upon the "action of one state * * * [reaching] through the agency of natural laws, into the territory of another state," *Kansas v. Colorado*, 206 U. S. 46, depriving the plaintiff state of waters previously flowing through a natural channel across such state, to the injury of the plaintiff state and its inhabitants. *Kansas v. Colorado*, 185 U. S. 125. "[The] question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them," *Kansas v. Colorado*, 206 U. S. 46, and even absent any pecuniary interest, the plaintiff State may maintain the action as "parens patriae, trustee, guardian, or representative of all or a considerable portion of its citizens;" *Kansas v. Colorado*, 185 U. S. 125, because it has "an interest as a state in this large tract of land" and the "controversy rises, therefore, above a mere question of local private right and involves a matter of state interest." *Kansas v. Colorado*, 206 U. S. 46. "[A] River, throughout its course in both states, is but a single stream wherein each state has an interest which should be respected by the other." *Wyoming v. Colorado*, 259 U. S. 419. In such cases the "governing rule is that this court will not exert its extraordinary power to control the conduct of one state at the suit of another, unless the threatened invasion of rights is of serious magnitude." *Connecticut v. Massachusetts*, 282 U. S. 660.

In the public nuisance cases the Court has again clearly stated the principles governing its jurisdiction.

The nature of the offense must relate to injury to the "health and comfort of the large communities inhabiting those parts of the State," *Missouri v. Illinois*, 180 U. S. 208; or the threatened damage on a "considerable * * * scale to the forests and vegetable life, if not to the health, within the plaintiff state," *Georgia v. Tennessee Copper Company*, 206 U. S. 230; or when "The health, comfort, and prosperity of the people of the state and the value of their property * * * [are] gravely menaced," *New York v. New Jersey*, 256 U. S. 296; or by the "creation of a public nuisance of simple type," by throwing water upon the farms of another state thus injuring "the comfort, health, and prosperity of her farm owners." *North Dakota v. Minnesota*, 263 U. S. 365. Such an action "is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power." *Georgia v. Tennessee Copper Co.*, 206 U. S. 230. "Before this Court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the Court is prepared deliberately to maintain against all considerations on the other side." *Missouri v. Illinois*, 200 U. S. 496. The Court has emphasized

the "caution with which demands of this sort, on the part of a state, for relief from injuries analogous to torts, must be examined," *Georgia v. Tennessee Copper Co.*, 206 U. S. 230 for the "threatened invasion of rights must be of serious magnitude." *North Dakota v. Minnesota*, 263 U. S. 365.

In considering the water diversion and public nuisance cases it becomes apparent that the expressions "quasi-sovereign capacity," and "an action in *parens patriae*," have become words of art having great particularity of meaning. The finding of "quasi-sovereign capacity" to maintain an original proceeding was based upon the exercise by a state of sovereign rights in the political control and protection of state territory. Indeed, the decisions are close relations of the boundary dispute cases. In each instance the state sought merely to exercise conventional powers of sovereignty—the regulation of water courses and the abatement of nuisances with respect to its own territory. Jurisdiction of this Court was found where the exercise of such sovereign powers in usual forums was rendered impossible because the transgressor was another state or citizens of another state reaching through the agency of natural laws into the territory of the complainant state. And always the principle was announced that the invasion of rights must be of serious magnitude.

Pennsylvania v. West Virginia, 262 U. S. 553, and *Georgia v. Pennsylvania Ry. Co.*, 324 U. S. 439, upon which plaintiff relies are merely extensions of rules of the water diversion and nuisance cases.

The Court was careful to find the most direct analogies to its earlier decisions. The strict requirements of showing a genuine sovereign interest in the complainant States were not relaxed. The nature of the State interest was described in *Pennsylvania v. West Virginia*, as follows:

> "* * * Each [State] sues to protect a two-fold interest, one as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will be similarly affected. Both interests are substantial and both are threatened with serious injury."

The Court then found that the natural objects of a sovereign's exercise of police power were involved and that the threatened injury was of the most serious magnitude. In establishing the direct analogy to the water diversion and nuisance cases, the Court said:

> "The private consumers in each state not only include most of the inhabitants of many urban communities, but constitute a substantial portion of the state's population. Their health, comfort, and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest, but one which is immediate and recognized by law.
>
> "In principle these views have full support in prior decisions. * * *"

In *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, the majority opinion found a justiciable controversy between Georgia and some twenty railroads for allegedly conspiring to fix freight rates so as to discriminate against the State. None of the prior decisions of the Court were overruled and indeed, the Court expressly adhered to the principles earlier announced regarding its original jurisdiction. Thus, the Court said:

> "* * * And though the suit is civil, leave to file will be denied where it appears that the suit brought in the name of the State is in reality for the benefit of particular individuals. *Oklahoma v. Atcheson, T. & S. F. R. Co.*, 220 U. S. 277; *Oklahoma ex rel. Johnson v. Cook*, 304 U. S. 387; *Jones ex rel. Louisiana v. Bowles*, 322 U. S. 707. Moreover, *Massachusetts v. Mellon*, 262 U. S. 447, and *Florida v. Mellon*, 273 U. S. 12, *supra*, make plain that the United States, not the State, represents the citizens as parens patriae in their relations to the Federal government."

The Court then reviewed the nature of its original jurisdiction.

> "In determining whether a state may invoke our original jurisdiction in a dispute which is justiciable, *Oklahoma ex rel. Johnson v. Cook*, *supra*, the interests of the State are not confined to those which are proprietary; they embrace the so-called 'quasi-sovereign' interests which in the words of *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, are 'independent of and behind the titles of its citizens, in all the earth and air within its domain.' * * * That case followed *Missouri v. Illinois*, 180 U. S. 208, where Missouri was granted leave to file a bill seeking to enjoin the discharge of sewage into the Mis-

> sissippi. The Court observed that 'if the health and comfort of the inhabitants of a State are threatened, the state is the proper party to represent and defend them.' 180 U. S., p. 241. And see *New York v. New Jersey*, 256 U. S. 296. * * *"

In describing the magnitude of the injury for which Georgia asked relief, the Court summarized:

> "* * * Georgia as a representative of the public is complaining of a wrong, which if proven, limits the opporunitities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister states. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. * * *"

This action brought in the name of California is concerned not with an invasion of that state's territory nor with an interference or invasion of rights of California citizens over which California may exercise its sovereign control. The complaint does not allege facts showing even perceptible injury to the agricultural economy of the State nor does it concern all or even a substantial portion of the State's population. There is no threat to the health, safety or general welfare of the citizens of California. The object of the suit is to expand markets for an already thriving wine industry by attacking the statutes of a foreign state. The suit is brought on behalf of the private wine producers of California.

The facts of this case cannot be brought within any of the decisions reviewed above. They find their parallel in the decisions of *New Hampshire v. Louis-*

iana, 108 U. S. 76; *Louisiana v. Texas*, 176 U. S. 1; *Kansas v. United States*, 204 U. S. 331; *Oklahoma v. Atchison, T. & S. F. Ry.*, 220 U. S. 277; *Alabama v. Arizona*, 291 U. S. 286; *Oklahoma v. Cook*, 304 U. S. 387; *Jones ex rel. Louisiana v. Bowles*, 322 U. S. 707.

The States in these cases asserted an interest of their own, claiming to sue in a quasi-sovereign capacity. But typically it was held in *Oklahoma v. Cook*, *supra*:

> "But this principle does not go so far as to permit resort to our original jurisdiction in the name of the State but in reality for the benefit of particular individuals, *albeit the State asserts an economic interest in the claims and declares their enforcement to be a matter of State policy.*" (Emphasis supplied.)

In *Jones ex rel. Louisiana v. Bowles*, 322, U. S. 707, a case similar to this, the Governor of Louisiana sought to enjoin enforcement of a Federal Price Administration regulation fixing prices on strawberries, which were alleged to be a crop of major interest to the economy of the State. Denying, per curiam, the sufficiency of Louisiana's interest to justify jurisdiction, this Court cited *New Hampshire v. Louisiana*, 108 U. S. 76; *Oklahoma v. Atcheson, T. & S. F. Ry.*, 220 U. S. 277; and *Oklahoma v. Cook*, 304 U. S. 387.

In *Land O'Lakes Creameries, Inc. v. Louisiana State Board of Health*, Appendix B, decided in the Eastern District of Louisiana this year the Court rejected an argument, identical to that of California, that Minnesota's interest in her dairy industry en-

titled her to be a party in an action attacking Louisiana statutes affecting the imports of dried milk.

Under the decisions of this Court, California has no standing to maintain this action.

II.

THE SUPREME COURT IS NOT THE PROPER FORUM TO HEAR THIS ACTION

This action being prosecuted on behalf of the producers of California wine may be reinstituted by the real parties in interest in the proper Federal district court suiing as defendants the Washington State Liquor Control Board. See *Land O'Lakes Creameries, Inc. v. Louisiana State Board of Health*, Appendix B. This is the usual and appropriate method of attacking the constitutionality of State statutes. See 28 U. S. C. § 2281 and annotations thereto, 28 U. S. C. A. § 2281.

California argues at page 34 of its brief that a suit in a lower court would postpone submission of the matter to this Court (i. e., require the plaintiff to appeal adverse decisions in the lower courts), "in view of the fact that, concededly, the State of California has the burden of convincing the Court of the need for some modification of expressions which appear in its prior opinions construing the Twenty-first Amendment."

The fact that this Court has already construed the Twenty-first Amendment adversely to California's contentions here, would seem to be the poorest

possible reason for the exercise of this Court's extraordinary original jurisdiction. Compare the admonition of Mr. Justice Fuller in *Louisiana v. Texas*, 176 U. S. 1, at 15:

> "But it is apparent that the jurisdiction is of so *delicate and grave a character* that it was not contemplated that it would be exercised save when *the necessity was absolute and the matter in itself properly justiciable.*" (Emphasis supplied.)

III.

SUBSTANTIVE QUESTIONS

A. California Has Failed to State a Justiciable Controversy.

In this action California seeks to challenge the validity of certain laws and regulations of the State of Washington as they apply to the sale, distribution, pricing and sales promotional activities of wine produced and owned by citizens, associations and corporations of California. The brief of the State of California in its attempt to invoke the original jurisdiction of the Court insists that the action is not pressed on behalf of the individual citizens, associations, or corporations, but solely by the State itself in its "quasi-sovereign" capacity.

California complains that the statutes and the regulations of the State of Washington as they apply to California citizens, associations and corporations engaged in its wine industry are in conflict with and in violation of the Privileges and Immunities Clause of Article IV, Section 2, and the Commerce Clause of

Article I, Section 8, of the United States Constitution. California does not press the contention that the alleged discrimination is also in conflict with the Equal Protection Clause of the Fourteenth Amendment though it does reserve its right to also rely on this section of the amendment. It is the position of the State of Washington that the complaint and supporting brief of California do not present a case under these Constitutional provisions.

B. Washington Liquor Control Regulations Do Not Violate the Privileges and Immunities Clause of the Constitution.

Assuming as we must the truth of the allegations contained in the plaintiff's complaint, yet California has stated no cause of action against Washington under the Privileges and Immunities Clause of Article IV, Section 2. It is elementary that the rights therein guaranteed are personal to *natural persons* and cannot be invoked by or on behalf of a sovereign state. Furthermore, the unrestricted sale of liquor is not a "privilege' of California citizens as that term has been construed. Finally the Twenty-first Amendment to the Constitution has returned to the States its authority to regulate the importation of intoxicating liquors without reference to the Fourteenth Amendment, the Commerce Clause or the Privileges and Immunities Clause of the Constitution.

1. California Is Not a "Citizen" Entitled to Invoke the Privileges and Immunities Clause.

California, in its quasi-sovereign capacity, attempts to invoke the Privileges and Immunities Clause to invalidate certain laws and regulations of the State of Washington.

In this capacity California does not claim to sue on behalf of its individual citizens. California maintains that its position is the same as that of Georgia in *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, where the Court said:

> "* * * In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."

California has compared its interest in this action to that of Kansas in *Kansas v. Colorado*, 206 U. S. 46, and that of Pennsylvania in *Pennsylvania v. West Virginia*, 262 U. S. 553. In the *Kansas* case, *supra*, the Court said:

> "It is not acting directly and solely for the benefit of any individual citizen to protect his riparian rights. Beyond its property rights it has an interest as a State in this large tract of land bordering on the Arkansas river. Its prosperity affects the general welfare of the State. The controversy rises, therefore, above a mere question of local private rights and involves a matter of State interest, and must be considered from that standpoint."

In the *Pennsylvania* case, *supra*, the Court in describing this interest said:

> "This is a matter of grave public concern in which the State, as the representative of the

public, has an interest apart from that of the individuals affected."

Relying as it does on this quasi-sovereign capacity with an interest separate and apart from that of a citizen, California now seeks to invoke a clause of the Constitution which is available only to those natural persons who are citizens in the several states. The plaintiff conveniently overlooks the fact that this is not a case wherein a "citizen" of California, within the meaning of this clause, seeks to be placed upon the same footing as "citizens" of the State of Washington.

Article IV, Section 2, of the Constitution provides:

> "The *citizens* of each state shall be entitled to all Privileges and Immunities of *citizens* in the several States." (Emphasis supplied.)

In speaking of the nature and extent of the privileges and immunities protected by this clause, the Court in the *Slaughter-House Cases*, 16 Wall. 36, 77, had this to say:

> "Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."

And in *Paul v. Virginia*, 8 Wall. 168, the Court, in speaking of this section of the Constitution said:

> "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States,

so far as the advantages resulting from citizenship in those States are concerned."

The privileges and immunities of Article IV, Section 2, apply only to citizens. Citizens as used here applies only to natural persons, members of the body politic owing allegiance to the State. *Pembina Consolidated Silver Mining and Milling Co. v. Pennsylvania*, 125 U. S. 181. The privileges and immunities of citizenship do not apply to artificial persons as corporations, *Paul v. Virginia*, 8 Wall. 168; *Bank of Augusta v. Earle*, 13 Pet. 519; *Blake v. McClung*, 172 U. S. 239; *Pembina Consolidated Silver Mining and Milling Co. v. Pennsylvania, supra.* Under the same reasoning of the above cases the privileges and immunities under this Clause do not extend to a Massachusetts trust. *Hemphill v. Orloff*, 277 U. S. 537.

The privileges and immunities of citizenship under the Fourteenth Amendment do not extend to municipal corporations, *Williams v. Baltimore*, 289 U. S. 36. Although the Court in this case was speaking of privileges and immunities of citizens of the United States as distinguished from citizens of the State, the principle that such privileges and immunities are personal to the individual citizen as a natural person is the same.

Not only do these privileges and immunities of citizenship inure to individual citizens and are personal to them, they may not be assigned or imparted by them to any other person natural or artificial. *Slaughter v. The Commonwealth*, 13 Gratt., (Va.) 767. Assuming, therefore, that California initiated

the present suit on behalf of its individual citizens (which California denies in seeking the Court's original jurisdiction) the privileges and immunities of its individual citizens would not and could not be assigned to it.

California, therefore, not being a natural person and therefore not a citizen under this Clause has no standing to invoke this provision of the Constitution. This Court has said in *Heald v. District of Columbia*, 259 U. S. 114:

> "It has been repeatedly held that one who would strike down a State Statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures him. * * * [Citing cases.]"

By attempting to rely on this provision, the State of California is compelled to adopt an inconsistent position. In its arguments to invoke the original jurisdiction it attempts to divorce itself from the claims of its individual citizens and denies that this suit is in essence a suit on their behalf. By seeking to invoke this provision of the Constitution the State of California attempts to assert claims available only to its individual citizens. This the State of California cannot do.

2. The Business of the Sale, Transportation and Promotion of Intoxicating Liquor Is Not a Privilege and Immunity of Citizenship.

The privileges and immunities protected by Article IV, Section 2, do not include each and every

right or privilege enjoyed by the citizens of a state but are confined to those which are fundamental to citizenship. In reference to this point, the Court in *Corfield v. Coryell*, 4 Wash. Cir. Ct. 371, 6 Fed. Cases 546, said:

> "We feel no hesitation in confining these expressions to those privileges and immunities *which are fundamental*; which belong of *right to the Citizens of all free governments*, and which have at all times been enjoyed by Citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign." (Emphasis supplied.)

It has never been held that the business of dealing in intoxicating liquor is one of the privileges and immunities of citizenship. Because of its peculiar nature and its effect on the morals of the community the Courts have repeatedly held that the business of dealing in intoxicating liquor is not within the privileges and immunities of citizenship of a State or of the Federal Government.

In *Crowley v. Christensen*, 137 U. S. 86, the Court said:

> "There is no inherent right in a Citizen to sell intoxicating liquors by retail. It is not a privilege of a Citizen of the State or of a Citizen of the United States."

See also *Mugler v. Kansas*, 123 U. S. 623; *Giozza v. Tiernan*, 148 U. S. 657; *Bartemeyer v. Iowa*, 18 Wall. 129.

In *Mette v. McGuckin*, 18 Neb. 324, 25 N. W. 338, the Nebraska Court specifically held that a State law restricting issuance of liquor licenses to resi-

dents did not violate the Privileges and Immunities of Article IV. Section 2. This case was affirmed without opinion by the United States Supreme Court. *Mette v. McGucken*, 149 U. S. 781.

In *State v. Parker Distilling Co.*, 236 Mo. 210, 139 S. W. 453, the Court specifically held that a Missouri statute, which required the licensing of manufacturers and dealers in intoxicating liquor but which made an exemption as to intoxicants produced from grapes or fuits grown in the State, did not violate the Privilege and Immunities Clause of Article IV, Section 2, although it did hold the statute invalid on another ground.

The business of dealing in intoxicating liquor has never been included within the definition of a privilege or immunity either under the Fourteenth Amendment or Article IV. Whatever criticism may be leveled against alleged discriminatory laws of a State in the field of intoxicating liquor the claim that they violate the privilege and immunities of Citizenship is not a valid one.

3. The Twenty-first Amendment Exempts the Regulation of Liquor Imports From the Effect of the Privileges and Immunities Clause of Article IV, Section 2.

The Court has not before been called upon to examine the effect the Privileges and Immunities Clause on the transportation or importation of intoxicating liquor into a state in the light of the Twenty-first Amendment. The reasons are obvious. The parties claiming protection of this Clause were

either not "citizens" within meaning of the clause, *Paul v. Virginia*, 8 Wall. 168, or else they were unable to show diversity of citizenship. *Bradwell v. Illinois*, 16 Wall. 130; *Slaughter-House Cases*, 16 Wall. 36.

As heretofore stated this case is not one sued out by citizens of California in their own right but by the State of California itself in its quasi-sovereign capacity. The State's interest differs from that of the individual citizens. The State does not enjoy the same standing as its citizens under the Constitution. Under this situation, it is insisted that the State does not have any standing to invoke the Privileges and Immunities Clause. Assuming, however, for the sake of argument, that the question of Privileges and Immunities is properly before the Court it is submitted that the Twenty-first Amendment exempts the regulation of liquor imports from the effect of this Clause.

The Twenty-first Amendment, Section 2, provides:

> "The transportation or importation into any State, Territory or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

This Court has ruled that since the adoption of the Twenty-first Amendment, the Commerce Clause has no application to state laws and regulations dealing with intoxicating liquors imported from another state. *State Board of Equalization v.*

Young's Market Co., 299 U. S. 59; *Indianapolis Brewing Co. v. Liquor Commission*, 305 U. S. 391; *Joseph S. Finch & Co. v. McKittrick*, 305 U. S. 395.

Based on the same reasoning this Court has held that the Equal Protection Clause of the Fourteenth Amendment has no application to state laws dealing with imported liquor. *William Mahoney v. Joseph Triner Corp.*, 304 U. S. 401; *State Board of Equalization v. Young, supra.*

It must be admitted that the Commerce Clause and the Equal Protection Clause are as important to the "theme of economic unity" which pervades the Constitution as is the Privileges and Immunities Clause of Article IV, Section 2. Yet the Court has ruled that in the face of the Twenty-first Amendment the Commerce Clause and the Equal Protection Clause have no application to state laws dealing with imported intoxicating liquor. In view of the reasoning employed by the Court it is impossible to place the Privileges and Immunities Clause in any different category.

In *State Board of Equalization v. Young's Market, supra*, the Court rejected the argument that the Twenty-first Amendment should be limited in its application so as to place imported liquor and domestic liquor on equal terms, saying:

> "To say that, would involve not a construction of the Amendment, but a re-writing of it."

And again in discussing the application of the Fourteenth Amendment, the Court said:

> "The claim that the statutory provisions

> and the regulations are void under the equal protection clause may be briefly disposed of. A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth."

In view of the Court's pronouncements and the reasoning therefor holding that Article I, Section 8 and the Fourteenth Amendment inapplicable to State laws regulating imported intoxicating liquor, the conclusion is inescapable that in the same field, Article IV, Section 2, has no application. A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by Article IV, Section 2.

C. By Virtue of the Twenty-first Amendment the Right of the State of Washington to Prohibit or Regulate the Importation of Intoxicating Liquor Is Not Limited by the Commerce Clause.

California in its brief has attempted to interpret the meaning of the Twenty-first Amendment in a manner not called for by the plain wording of the Amendment and not in keeping with the decisions of this Court. California insists that the application and intent of the Twenty-first Amendment is identical to that of the Wilson Act and the Webb-Kenyon Act. Such a contention ignores the distinction between an Act of Congress which must be subject to the Constitution and the Constitution itself.

In seeking to establish that Congress intended to provide in the Amendment limitations identical to those of the Webb-Kenyon Act, California quotes the words of Senator Blaine of Wisconsin as to its purpose as follows:

> "to insure the so-called dry States against the importation of intoxicating liquors into those States." (Pl. Br. 47-48.)

However, California has overlooked other more illuminating statements of the Senator on the intent of the Amendment. They are as follows:

> "* * * When our Government was organized and adopted, the states surrendered control over and regulation of interstate commerce. This proposal (the 21st Amendment) is restoring to the states, in effect, the right to regulate commerce respecting a single commodity—namely, intoxicating liquor." 76 Cong. Rec. 4141.
>
> "* * * The purpose of Section 2 is to restore to the states by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the states." 76 Cong. Rec. 4143.

However compelling the remarks of the distinguished Senator might be as to the intent of the Amendment it is admitted that they are not controlling. The Amendment as framed required the ratification by the states. If the debates of Congress are to be examined to find the intent of the Amendment, then the remarks of the legislators of the several states would also require examination. Actually the intent of Congress which framed the Amendment and of the states which ratified it must be found in the plain words of the Amendment itself. *United States v. Wong Kim Ark*, 169 U. S. 649, 699.

In considering the plain language of the Amendment as against the identical question raised, namely, that the state may prohibit intoxicating liquors en-

tirely but if it permits any manufacture and sale thereof, imported liquors must be on an equal footing with domestic liquors, the Court said in *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59:

> "To say that, would involve not a construction of the Amendment, but a rewriting of it."

In the above case the Court held that a license for the privilege of importing beer, though admittedly a burden of commerce, was not invalidated by the Commerce Clause by virtue of the Twenty-first Amendment. In addition the Court in response to the claim that the California law violated the Equal Protection Clause succinctly disposed of the Argument in these words at page 64:

> "A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth."

In the *Young's Market* case it was also contended as it is here that despite the Twenty-first Amendment the State's liquor laws and regulations must be designed for the purpose of protecting public health, safety and morals. It was argued in that case that the license fee was not imposed for the purpose of protecting health, safety and morals since domestic beer of like quality was permitted without such a fee and hence the license requirement must be held invalid. In answer to the argument the Court said:

> "* * * Surely the state may adopt a lesser degree of regulation than total prohibition. Can it be doubted that a state might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by lay-

> ing a heavy impost, or channelize desired importations by confining them to a single consignee? [citing cases]. There is no basis for holding that it may prohibit, or so limit, importation only if it establishes monopoly of the liquor trade. It might permit the manufacture and sale of beer, while prohibiting absolutely hard liquors. If it may permit the domestic manufacture of beer and exclude all made without the State, may it not, instead of absolute exclusion, subject the foreign article to a heavy importation fee? * * *" (229 U. S. at 63).

The plaintiff in its brief attempts to distinguish the *Young's Market* case by pointing out that the license fee imposed in that case for the privilege of importing beer did not involve "discrimination prohibited by the Commerce Clause." (Pl. Br. 50); that since Washington laws and regulations present different marketing and pricing procedures as to domestic and foreign wines, the Washington laws and regulations present a discrimination prohibited by the Commerce Clause and hence should be held invalid. In attempting to argue this position the Plaintiff has conveniently ignored the decisions of this Court in applying the principles announced in the *Young's Market* case to situations in which clear cases of discrimination under the Commerce Clause as well as the Equal Protection Clause were presented. *Indianapolis Brewing Co. v. Liquor Commission*, 305 U. S. 391; *Joseph S. Finch & Co. v. McKittrick*, 305 U. S. 395.

The last two cases cited did not as the plaintiff contends in its brief at page 46 involve liquor taxes.

Both cases involved absolute prohibition and exclusion of intoxicants manufactured in particular states while permitting importation of intoxicants of the same nature and quality from other states as well as permitting local manufacture, sale and distribution of the same. Both cases adopted the principles annuonced in the *Young's Market* case.

In *Indianapolis Brewing Co. v. Liquor Commission, supra,* the Court was involved with a Michigan statute which absolutely prohibited the sale of beer manufactured in Indiana because Indiana had imposed a license for the privilege of importing beer. The Michigan act was obviously a retaliatory measure and involved the most flagrant type of discrimination. The Court held that in spite of the nature of the Michigan Act, it was valid. The Court held that the Commerce Clause does not limit the right of the State to prohibit or regulate the importation of intoxicants by virtue of the Twenty-first Amendment. The Court also held that such action on the part of the State was not prohibited by the Equal Protection Clause.

In *Joseph S. Finch & Co. v. McKettrick, supra,* the Court was concerned with a Missouri statute which absolutely prohibited transportation, importation, possession, purchase and sale of alcoholic liquor manufactured in a "State in which discrimination exists." Certain manufacturers of liquor from the states which discriminated sought to declare the Missouri Act unconstitutional under the Commerce Clause, the Due Process Clause and the Equal Pro-

tection Clause. In reference to the Commerce Clause it was urged that the Missouri act did not relate to the protection of public health, safety and morality and the promotion of social welfare but was simply an economic weapon of retailiation and not permitted under the Twenty-first Amendment. The Court again ruled that since the Amendment the Commerce Clause did not limit the authority of the State to prohibit or regulate the importation of liquor.

A review of these cases clearly establishes that since the Twenty-first Amendment the Commerce Clause does not restrict the States in regulating the importation of intoxicating liquor whether the action of the State amounts to a burden on commerce as in the *Young's Market* case or an outright discrimination as in the *Indianapolis Brewing Co.* case and the *Joseph S. Finch and Co.* case. See also the opinions of Justice Frankfurter in *United States v. Frankfort Distilleries*, 324 U. S. 293 and *Carter v. Virginia*, 321 U. S. 131.

Applying the above to the instant case it is clear that the laws and regulations of the State of Washington as they apply to California wines and wineries are not invalid under the Commerce Clause.

D. The Equal Protection Clause Does Not Apply to State Action Limiting or Restricting the Importation and Sale of California Wine.

The plaintiff in its brief at page 38 expressly declines to argue that the Acts and Regulations of the State of Washington are in conflict with the Equal

Protection Clause of the Fourteenth Amendment in view of the Court's decision in *Mahoney v. Joseph Triner Corp.*, 304 U. S. 401. We assume therefore that this contention raised in Plaintiff's complaint is waived.

In passing we may point out that there is additional authority holding that the Equal Protection Clause does not apply to State laws restricting liquor traffic in view of the Twenty-First Amendment.

This Court has ruled on several occasions where this Clause was specifically relied on to challenge State action in this field that it did not apply. *State Board of Equalization v. Young's Market*, 299 U. S. 59; *Indianapolis Brewing Co. v. Liquor Commission*, 305 U. S. 391; *Joseph S. Finch & Co. v. McKittrick*, 305 U. S. 395.

There is an additional reason in the instant case why the Equal Protection Clause has no application. The pertinent provisions of the Fourteenth Amendment as they apply to this clause are as follows:

> "* * * No state shall make or enforce any law which shall * * * deny to any person *within its jurisdiction* the equal protection of the laws." (Emphasis supplied)

By the very wording of the clause a state is prohibited to deny the equal protection of its laws to those *within its jurisdiction.* The Supreme Court has pointed out that these words must be given their ordinary and natural meaning and that the prohibition of the Clause is limited to those within the jurisdiction of the State whose laws are challenged. *Blake v. McClung*, 172 U. S. 239.

In *Blake v. McClung, supra*, it was held that a foreign corporation, not present in the State and subject to its jurisdiction, could not complain that the laws of such State violated the Equal Protection Clause.

In the instant case we are concerned with the sovereign state of California suing in a capacity separate and apart from that of its citizens seeking to invoke the Equal Protection Clause to invalidate certain laws and regulations of Washington. The State of California is obviously not subject to the jurisdiction of the State of Washington. As such California cannot invoke the Equal Protection Clause to invalidate the challenged laws and regulations.

CONCLUSION

For the reasons stated, the motion for Leave to File a Complaint should be denied.

Dated April 25, 1958.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, being first duly sworn, deposes and says:

That on the 25th day of April, 1958, he served the within and foregoing "Brief in Opposition to California's Motion for Leave to File a Complaint" upon the State of California, the plaintiff, as prescribed by Rules 9 and 33 (par. 3 (b)) of said Court:

He deposited at the post office at Olympia, Washington, two copies of the said Brief, securely enclosed in an envelope, air mail postage prepaid, addressed to each of the following officials of said plaintiff State at his post office address, as shown below:

Honorable Goodwin J. Knight,
Governor of the State of California,
State Capitol,
Sacramento, California.

Honorable Edmund G. Brown,
Attorney General of the State of California,
600 State Building,
San Francisco 2, California.

At the same time he deposited in the same post office two further copies of the said brief similarly enclosed with air mail postage prepaid, addressed to each of the following officials of the State of New York appearing as *Amicus Curiae* at his post office address as shown below:

Honorable Averill Harriman,
Governor of the State of New York,
The Capitol,
Albany 1, New York.

Honorable Louis J. Lefkowitz,
Attorney General of the State of New York,
The Capitol,
Albany 1, New York.

THOMAS R. GARLINGTON,
Special Assistant Attorney General of the State of Washington.

Sworn to before me this 25th day of April, 1958.

LORETTA WALTERBACK,
Notary Public for the State of Washington, residing at Olympia.

APPENDIX A

TEXT OF PERTINENT PROVISIONS OF CALIFORNIA AGRICULTURAL CODE

§ 1300.15 Provisions of marketing order

(a) (1) Advisory boards; appointment of members. Any marketing order issued pursuant to this chapter shall provide for the establishment of an advisory board to assist the director in the administration of any marketing order. The members of the board shall be appointed by the director and may hold office at the pleasure of the director. If the marketing order affects directly only producers of a particular commodity the members of the board shall be producers. If the marketing order affects directly only handlers of a particular commodity the members of the board shall be handlers. If the marketing order affects directly both producers and handlers of a particular commodity, such board shall be composed of both producers and handlers. The numbers of producers or handlers upon any such board shall be of such number of producers or handlers as the director finds is necessary to assist properly in the administration of such order. Upon the recommendation of the board, the director may appoint one person who is neither a producer nor a handler to represent the Department of Agriculture or the public generally.

(2) Compensation; powers and duties. No member of any such board shall receive a salary but each shall be entitled to his actual expenses incurred

while engaged in performing his duties herein authorized. The director may authorize such board: to enter into contracts or agreements, to employ necessary personnel including attorneys engaged in the private practice of the law, fix their compensation and terms of employment; and to incur such expenses, to be paid by the director from moneys collected as herein provided, as the director may deem necessary and proper to enable such board properly to perform such of its duties as are authorized herein. The duties of any such board shall be administrative only and may include only the following:

a. Subject to the approval of the director to administer such marketing order.

b. To recommend to the director administrative rules and regulations relating to the marketing order.

c. To receive and report to the director complaints of violations of the marketing order.

d. To recommend to the director amendments to the marketing order.

e. To assist the director in the assessment of members of the industry and in the collection of funds to cover expenses incurred by the director in the administration of the marketing order.

f. To assist the director in the collection of such necessary information and data as the director may deem necessary to the proper administration of this chapter.

§ 1300.16 Assent to marketing order and amendments; termination of order; rules and regulations

(a) (1) Assent to order and major amendments; handlers. No marketing order or major amendment thereto, directly affecting handlers, issued pursuant to this chapter, shall become effective unless and until the director finds that such marketing order or amendment thereto has been assented to in writing by the handlers engaged in the marketing activity or activities regulated by such marketing order who handle not less than sixty-five (65%) of the volume of the agricultural commodity regulated thereby which is processed or distributed within the area defined in such marketing order or amendment thereto, or that such marketing order or amendment thereto has been assented to in writing by not less than sixty-five percent (65%) of the number of handlers engaged in the marketing activity or activities regulated by such marketing order; provided, however, that any marketing order or major amendment thereto directly affecting processors engaged in the operation of canning of fresh fruits or vegetables or canning or packing of dried fruits shall not be made effective by the director unless and until the director finds that such marketing order or amendment thereto has been assented to in writing by such processors engaged in the marketing activity or activities regulated by such marketing order or amendment thereto who processed not less than sixty-five percent (65%)

of the volume of such agricultural commodity which is processed within the area defined in such marketing order or amendment thereto and by sixty-five percent (65%) of the number of such processors engaged in the marketing activity or activities regulated by such marketing order or amendment thereto.

(2) Assent to order and major amendments; producers; referendum. No marketing order or major amendment thereto, directly affecting producers or producer marketing, issued pursuant to this chapter, shall be made effective by the director unless and until the director finds one or more of the following: (A) That such marketing order or amendment thereto has been assented to in writing by not less than sixty-five percent (65%) of the producers who are engaged, within the area specified in such marketing order or amendment thereto, in the production for market or engaged in such producer marketing, of not less than fifty-one percent (51%) of the agricultural commodity specified therein in commercial quantities, or (B) that such marketing order or amendment thereto has been assented to in writing by producers who produce not less than sixty-five percent (65%) of the volume of such agricultural commodity and by fifty-one percent (51%) of the total number of producers so engaged, or (C) that such marketing order or amendment thereto has been approved or favored by producers in a referendum among producers directly affected if the valid votes cast in such referendum in favor of such marketing order or amendment thereto represent not

less than fifty-one percent (51%) of the total number of producers of said commodity of record with the department who marketed not less than fifty-one percent (51%) of the total quantity of said commodity marketed in the next preceding marketing season by said total number of producers of record with the department. Whenever any marketing order or any major amendment to any marketing order is issued by the director, he shall determine whether assent, approval, or favor thereto of the producers shall be by written assents or by referendum.

(c) Suspension or termination of marketing order. The director shall suspend or terminate any marketing order, whenever he finds, after a public hearing duly noticed and held in accordance with the provisions of Section 1300.13 of this chapter, that such marketing order is contrary to or does not tend to effectuate the declared purposes or provisions of this chapter within the standards and subject to the limitations and restrictions herein imposed; provided, that such suspension or termination shall not become effective until the expiration of the marketing season then current. If the director finds that the termination of any marketing order is requested in writing by more than forty percent (40%) of the producers, who are engaged within the State of California in the production for market of the agricultural commodity specified in such marketing order, and who produce forty percent (40%) of the volume of such agricultural com-

modity produced within the State of California for market, and finds that the termination of such marketing order is requested in writing by handlers who handle more than forty percent (40%) of the volume of the agricultural commodity covered thereby and by more than forty percent (40%) of the number of handlers of the agricultural commodity covered thereby, the director shall, if he finds such marketing order is contrary to or does not tend to carry out the declared policy of this chapter, terminate such marketing order; provided, that such termination shall be effective only if announced on or before such date (prior to the end of the marketing period then current) as may be specified in such marketing order.

§ 1300.17 Assessments

(f) Disposition of moneys collected; refunds.

* * * * * * * *

Any moneys remaining in such fund, allocable to any particular agricultural commodity affected by a marketing order, at the discretion of the director, may be refunded at the close of any marketing season upon a pro rata basis, to all persons from whom assessments were collected, or such portion of such moneys as may be recommended by the board and approved by the director may be carried over into the next succeeding marketing season whenever the director finds that such moneys may be required to assist in defraying the costs of operating such marketing order in such succeeding marketing season; * * *

APPENDIX B

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

LAND O'LAKES CREAMERIES, INC. and MAPLE ISLAND, INC., *Plaintiffs*,

versus

LOUISIANA STATE BOARD OF HEALTH and H. LUTHER HORTMAN, *Defendants*.

No. 7229
Civil Action

Before WISDOM, Circuit Judge, CHRISTENBERRY, Chief Judge, and WRIGHT, District Judge

WRIGHT, District Judge:

The original plaintiffs in this action are Minnesota manufacturers of dairy products who sell dried milk in Louisiana. They seek, first, to have a Louisiana statute[1] affecting the labelling of dried milk declared unconstitutional as being arbitrary, discriminatory, and an unreasonable burden on interstate commerce, and, second, to enjoin the officials of the Louisiana State Board of Health from giving effect to the provisions of this statute. Since the remedy sought is restraint of state officers acting pursuant to an allegedly unconstitutional state statute, a three-judge court was convened. 28 U. S. C. § 2281. This opinion is concerned only with the motion of the State of Minnesota, filed by her At-

[1] Act 415 of 1956, La. R. S. 40:921.

torney General[2] in advance of trial, to intervene in this action as a party plaintiff in order to represent the interests of all dried milk manufacturers in Minnesota not already parties herein. The question presented is whether Minnesota has the required interest in the outcome of this litigation to participate as a party. In short, has she a justiciable interest?

Just what is a justiciable interest is a question which has plagued the courts since the beginning of the judicial process.[3] Although it is difficult, if not impossible, to define such an interest categorically, one of its fundamental requirements certainly is that a party be directly and personally concerned in the outcome of the litigation to the extent that his participation therein will insure "a genuine adversary issue between the parties, without which a court may not safely proceed to judgment." *United States v. Johnson*,[4] 319 U. S. 302, 304. Such an interest is lacking when a state undertakes to sue for the particular benefit of a limited number of its citizens.[5] In such a posture the state is a "mere volunteer."[6] "(T)he state must show a direct in-

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[2] The Attorney General cites, as his authority, Chapter 840 of the Laws of Minnesota for 1955:

"The attorney general is authorized to take such action as he deems necessary in order to contest or oppose existing statutes, ordinances, regulations, orders or other trade barriers which may restrict the sale in other states of milk or other dairy products produced in Minnesota; * * *"

[3] See opinions of Mr. Justice Frankfurter in *Joint Anti-Fascist Refuggee Committee v. McGrath*, 341 U. S. 123, 149; *Coleman v. Miller*, 307 U. S. 433, 460.

[4] See also *Muskrat v. United States*, 219 U. S. 346; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339.

[5] *Massachusetts v. Missouri*, 308 U. S. 1, 17; *Oklahoma v. Atchison, T. & S. F. Ry.*, 220 U. S. 277. Cf. *New Hampshire v. Louisiana*, 108 U. S. 76.

[6] See *Pennsylvania v. West Virginia*, 262 U. S. 553, 591.

terest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest." *Oklahoma ex rel. Johnson v. Cook*, 304 U. S. 387, 396.

Apart from direct proprietary rights, which Minnesota does not, and cannot, here assert, a state may have such an interest only by virtue of its duty to protect the general welfare "as parens patriae, trustee, guardian or representative of all or a considerable portion of its citizens." *Kansas v. Colorado*, 185 U. S. 125, 142. Thus the State of Georgia, as representative of the public, was allowed to bring suit against twenty railroads to enjoin "a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States." *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 451. In *Missouri v. Illinois*, 180 U. S. 208, Missouri was allowed to bring a bill to enjoin the dumping of Chicago sewage into a canal draining into the Mississippi River and poisoning the water supply to Missouri land and residents. The Court said that "if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them." *Missouri v. Illinois, supra*, p. 241. And in *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, Georgia was allowed to sue to enjoin the defendant from discharging noxious gases from its works in Tennessee over Georgia territory.

The State of Minnesota has attempted in her complaint, filed together with he motion to intervene,[7] to bring her interest within the orbit of these cases by characterizing the dairy industry as one which involves "a major economic activity of importance to the welfare of the people of Minnesota." Such an assertion is not determinative of the question of justiciable interest sufficient to participate in the litigation as a party.[8] Minnesota's complaint, which adopts the allegations of the original complaint, concerns only that part of the state's dairy industry which is engaged in the manufacture of dried milk. Notice may be taken of the fact that the dairy industry itself is neither the only nor the largest industry in Minnesota.[9] The dairy industry statistics offered by Minnesota fail to demonstrate that the sale of dried milk is of such pervasive importance to that industry and to Minnesota citizens generally that restrictions on the interestate distribution of dried milk would directly and materially affect the "welfare of the people of Minnesota." Thus the interests of the single industry here involved must be held to be private interests, not interests affecting the whole economy or all the people of the state. This type of interest is insufficient to give Minnesota the right to sue as *parens patriae* in behalf of all, or a substantial number, of her citizens.

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[7] See Rule 24 (c), Fed. R. Civ. P.

[8] See *Oklahoma ex rel. Johnson v. Cook*, *supra*, pp. 391, 394.

[9] In the World Almanac for 1956, the entire dairy industry is ranked ninth among principal industries in Minnesota.

The interest which Minnesota here asserts is not similar to that asserted by the states in the cases on which Minnesota relies.[9] Minnesota's interest here is more comparable to the interest asserted by the State of Louisiana in *Jones ex rel. Louisiana v. Bowles*, 322 U. S. 707, in which the Governor of Louisiana sought to enjoin enforcement of a Federal Price Administration regulation fixing prices on strawberries, which were alleged to be a crop of major interest to the economy of the state. Denying, per curiam, the sufficiency of Louisiana's interest to justify jurisdiction, the Supreme Court cited, among other cases, not those relied on by Minnesota, but *New Hampshire v. Louisiana, supra, Oklahoma v. Atchison T. & S. F. Ry., supra,* and *Oklahoma ex rel. Johnson v. Cook, supra.* These cited cases hold that a state may not sue for the benefit of individual interests, that before a state has standing to sue *parens patriae,* it must be shown that the interest asserted materially affects the health and welfare of all the people of the state, or at the very least a substantial portion thereof. Thus, in *Bowles, supra,* the Court held that Louisiana's concern for its strawberry industry was not of such general interest to people of the state as to give the state standing to sue. There is nothing in the record in the present case to show that the interest of the people of Minnesota in dried milk is any greater than the interest of the people of Louisiana in strawberries.

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[9] *Georgia v. Tennessee Copper Co., supra; Kansas v. Colorado, supra; Missouri v. Illinois, supra; California v. United States,* 9 Cir., 180 F. (2d) 596.

Notice is taken that a statute of the state of Minnesota specifically gives her Attorney General the authority he is here asserting.[18] However binding that statute may be on the courts of Minnesota,[19] its effect can be little more than persuasive on other courts. Unquestionably, the fact that the Legislature of Minnesota has indicated its interest in the dairy industry should be accorded great weight. Also to be considered, however, is the advisability of allowing the Attorney General of Minnesota to range at large in courts of other states, and of the United States, seeking to have declared unconstitutional laws passed by the legislatures of those states.

Actually, there is no real need that Minnesota intervene herein as a party. The Minnesota dairy industry can adequately protect its own interests. The Minnesota dried milk producers, who are not parties herein, may themselves intervene, or, if they choose, sit on the sidelines and hope for a favorable result. If the result is unfavorable, these producers, not parties, may nevertheless have their own day in court on the same issues at some future time, something they may not be able to do if Minnesota were allowed to intervene as their representative.

In recognition of the interest expressed in these and similar proceedings by the legislature of the State of Minnesota, this court deems it appropriate to exercise its discretion to invite the Attorney Gen-

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[18] See Note 2.

[19] Compare 28 U. S. C. § 2403; 11 U. S. C. § 608; *Securities and Exchange Commission v. U. S. Realty Co.*, 310 U. S. 434.

eral of Minnesota to appear in these proceedings as *amicus curiae*, to participate fully in the trial of the case, to examine or cross-examine witnesses, and to take other steps deemed advisable which will not interfere with the orderly conduct of this action by the parties thereto. Compare *Florida v. Georgia*, 58 U. S. (17 How.) 478, 494, 495.

Motion to intervene as a party denied.

J. SHELLY WRIGHT,
United States District Judge

New Orleans, Louisiana,
February 21, 1958.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 13, Original

STATE OF CALIFORNIA, *Plaintiff,*

vs.

STATE OF WASHINGTON, *Defendant.*

REPLY BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE A COMPLAINT.

PRELIMINARY STATEMENT.

The State of California has not the slightest intention of abandoning any of the arguments set forth in its Brief in Support of Motion to File a Complaint. For brevity, this reply to the Brief of the State of Washington in Opposition to such motion is directed to the issue now joined as to Point I, A of the California Brief (pp. 14-21). Therein California asserted:

> "This case is unique in the history of suits between the states in one respect. This bears directly upon the standing of the State of California to sue.
>
> "Herein the State of California asserts the right to remain free of discriminatory legislation of another state in carrying on, outside of its own boundaries, interstate activities of a commercial nature to promote the sale of a commondity in interstate commerce. It contends that this aspect of its Complaint is itself sufficient to warrant the granting of leave to file it. None of the prior decisions of this Court concerning its original jurisdiction have involved any comparable activity on the part of the complainant state" (Calif. Br. p. 14).

Washington disputes this on the ground that the instant case is controlled by *Oklahoma v. Cook,* 304 U.S. 387 (Wash. Br. pp. 3, 5, 17-23). It is contended that—

> ". . . the state activity in each case as well as the action brought in this court is on behalf of particular individuals which is insufficient basis for invoking the original jurisdiction of this Court." (Wash. Br. pp. 17-18).

Washington contends further that its statutes and regulations do not "legally limit" the wine sales promotion activities of California state agencies (Wash. Br. 3, 5, 13-17).

This Reply Brief will show the fallacy of both arguments in the order stated.

ARGUMENT.

1. OKLAHOMA v. COOK HAS NO APPLICATION HERE: THE PROTECTION OF ITS OWN SALES PROMOTION PROGRAM AGAINST UNCONSTITUTIONAL RESTRICTIONS IS NOT AN ACTION BY CALIFORNIA ON BEHALF OF PARTICULAR INDIVIDUALS.

An action brought "on behalf of particular individuals" is, by definition, a derivative action. It assumes a legal injury to and the accruing of a cause of action in the particular individuals. It further assumes a voluntary assignment or a transfer by operation of law of that right of action from such individuals to the nominal party plaintiff in the action brought to enforce such rights.

Cook squarely fits this pattern of derivative action. The statutes of Oklahoma directed its Bank Commissioner to wind up the affairs of any insolvent bank organized under state law, and to sue its shareholders to enforce their statutory liability for the amount of stock owned. In *Cook,* the Oklahoma Bank Commissioner sought to invoke the original jurisdiction of this Court to obtain a money judgment from a shareholder of an insolvent bank based upon his statutory liability.

The Court very properly found that this recovery was sought by the state "solely for the benefit of the depositors and creditors of the bank", and held that because Oklahoma was not, therefore, asserting a direct interest of its own, it had no standing to sue in the original jurisdiction of the Court. (304 U.S. at 395, 396).

Two aspects of *Cook*, not mentioned in the Washington Brief, compel the conclusion that it has little relevance here and, certainly, does not control the disposition of California's pending motion.

A. In Cook, the State's cause of action was a derivative one; in the instant case, it is not.

In *Cook*, the cause of action sued upon by Oklahoma was derived from a pre-existing cause of action, accrued or inchoate, already possessed by the bank creditors. Oklahoma was nothing more than a trustee for the benefit of these creditors. It follows that, had Oklahoma not embarked upon its program of legally enforcing the shareholders' liability to bank creditors, the creditors legally could have and would have brought their own actions for the same purpose.

In the instant case, California's cause of action arising from the unconstitutional restrictions placed upon its sales promotion program is not derived by it from any person or legal entity. By definition, it arises from the legal injury done to its own program, i.e., to activities of the State itself. If California has no standing to sue for redress of the unconstitutional restrictions placed upon the conduct and operations of its own state agencies, then no plaintiff legally exists who is qualified to bring this action. In a word: there is no alternative plaintiff. Certainly, the producers of California wine have no litigable interest in the State's program and the official acts of the State's employees in furtherance thereof. This case is, therefore, the *converse* of *Cook*, not its parallel, as Washington contends.

It may well be that California wine producers, also, have been injured by operation of Washington laws, in the conduct of their respective businesses, and have thereby become vested with their own causes of action against Washington. Those causes, however, are wholly independent of the cause under discussion here.

B. In Cook, the State's program suffered no restriction or legal injury; in this case, it did and does.

In the course of pursuing its program of bank liquidation and enforcement of shareholders' liabilities, Oklahoma suffered no loss or invasion of any right conferred upon it by the Constitution of the United States. No person, no other state restricted or prevented Oklahoma from carrying out its program--certainly not in any manner which gave rise to an independent cause of action for relief and redress from any such restriction or prevention.

In sharp contrast, the right of California to sue now under discussion (Calif. Br. I, A, pp. 14-21) arises from the discriminatory and unwarranted interference by Washington with the execution of its program.

Summing up, in *Cook,* the cause sued upon did not arise from injury or interference with the State's program; instead, it was derived by the State from the bank creditors. The very *raison d'etre* of Oklahoma's program was to enforce, by state action, shareholders' liabilities as an incident of bank liquidation. Here the purpose and scope of the California pro-

gram is the interstate promotion, by activities of a commercial nature carried on by the State, of the sale of California wine. The cause here discussed is not a part or element of, or in furtherance of that program. On the contrary, it is to protect the program from unwarranted restrictions and interference being inflicted upon it by the official acts of another state. To assert and obtain this protection there is no possible plaintiff other than the State of California.

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2. OKLAHOMA v. COOK HAS NO APPLICATION HERE: CALIFORNIA'S PROGRAM OF WINE SALES PROMOTION IS NOT ACTIVITY ON BEHALF OF PARTICULAR INDIVIDUALS.

In an effort to minimize the fact that it is the sales promotion program and activities of the State itself which are frustrated and restricted by official acts of Washington, the Washington Brief (pp. 17-19) argues that these activities are conducted by California "on behalf of private persons" and that "the statutory scheme is to make the Director of Agriculture an agent for producers and handlers of various agricultural products." In support of this, Washington calls attention to the referendum provisions of the California Marketing Act (§ 1300.16 (a)(1) and (2)), which require that any marketing order issued by the Director be approved by a prescribed number of producers before becoming effective.

In *Parker v. Brown*, 317 U. S. 341, this Court considered the effect of such a referendum requirement under a comparable statute, the California Pro-

rate Act. Holding that the program and activities were those of the state, regardless of the referendum requirement, the Court said:

> "It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. . . . The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions. Compare *Currin v. Wallace,* 306 U. S. 1, 16; *Hampton & Co. v. United States,* 276 U. S. 394, 407; *Wickard v. Fulburn,* 317 U. S. 111." (317 U. S. at 352.)

Substituting the Director of Agriculture for the references to the Prorate Commission, this statement is fully applicable to the instant case.

The remaining references in the Washington Brief on this point contain inaccuracies that warrant correction.

Section 1300.16(c) does *not* provide "for termination of any marketing order by a request in writing" by a prescribed number of producers (Wash. Br. p. 18). Instead, the power of termination, like the power of issuance and enforcement, is vested exclusively in the Director of Agriculture. The section provides that if termination is requested by the requisite number of producers—

> ". . . the director shall, if he finds such marketing order is contrary to or does not tend to carry out the declared policy of this chapter, terminate such marketing order; . . ." (Calif. Agric. Code § 1300.16(c)).

As to the Wine Advisory Board (Wash. Br. pp. 18-20), it need only be noted that assessments levied by the Director of Agriculture and other moneys becoming due under the Wine Marketing Order are paid, not to the Wine Advisory Board, but to the Department of Agriculture. In turn, the Department makes all of the necessary disbursements and keeps the financial records of operations under the wine sales promotion program and other activities of the State conducted under the Wine Marketing Order.

Instead of the statutory scheme making the Director of Agriculture an "agent for producers and handlers" of wine (Wash. Br. p. 19), actually the industry members serving on the Wine Advisory Board are the agents and advisors of the Director. The Board collects no money, it has no money, it spends no money. It has no rule-making power, nor the power to make financial or other policy decisions; it can only make recommendations to the Director for his decision. It takes no action, except to assist the Director and, subject to his approval, to administer the programs and activities previously authorized by him. The duties of the Board, "shall be administrative only" (§ 1300.15(a)(2)).

In a word, the sales promotion activities involved in the Complaint are those of the State itself, over

which members of the California wine industry have no control. That the State's activities subserve a statewide public interest can readily be demonstrated. It was so declared in the legislative declarations of the economic conditions which gave rise to the California Marketing Act and of the purposes to be served thereby (§ 1300.10, 1300.11; Comp. App. D, pp. xv, xvi).

Moreover, this Court has acknowledged the legitimacy of a statewide interest in the national marketing of its agricultural products. In *Sligh v. Kirkwood,* 237 U. S. 52, the Court upheld a Florida statute prohibiting the interstate marketing of immature Florida citrus fruits, and said:

> "We may take judicial notice of the fact that the raising of citrus is one of the great industries of the state of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other states wherein such fruits find their most extensive market . . . The protection of the state's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relationship to the accomplishment of that purpose." (237 U. S. at 61-62).

If it is competent for a state to *protect* the reputation of its products in foreign markets, it is equally competent for a state to seek to *enhance* that reputation by interstate sales promotion activities of the type here involved.

3. THE EFFECT IN OPERATION OF WASHINGTON LAWS IS TO RESTRICT THE WINE SALES PROMOTION ACTIVITIES OF THE STATE OF CALIFORNIA. IT IS SPECIOUS TO CONTEND OTHERWISE, OR THAT SUCH AN EFFECT IS NOT ALLEGED IN THE COMPLAINT.

The Washington Brief (p. 3) states that in paragraphs 38(a) and 39-46 of its Complaint, "California implies, but does not allege, that the Washington statutes and regulations . . . operate directly to restrict or prohibit" sales promotion activities of California state agencies.

Contrary to this assertion, the Complaint makes such an allegation not once, but thrice. It alleges that California is "effectively precluded from" (Comp. par. 46), "denied the opportunity to" (Comp. par. 2(c)), "can [not]" (Comp. par. 36(d)) promote the sale of California wine in Washington because of the discriminations complained of which are shown in paragraphs 18-37 to arise directly from official acts of Washington. The Complaint is, of course, to be construed as a whole. Any doubt as to the intendment of the allegations of par. 2(c), 36(d) and 46 should have been eliminated by reference to the California Brief (p. 13).

Washington further asserts that its laws do not "restrict or prohibit" California's sale promotion activities. To the extent Washington contends that California's activities are not *prohibited* in terms by Washington law, it is arguing an issue not raised by either California allegation or argument. To the extent it contends that such activities are not *restricted* as a result of the practical operation of Washington

laws, it contravenes the allegations of the Complaint (pars. 2(c), 36(d), 46).

It is self-evident that the most effective control over business activities a state can devise is control over the existence of the economic institutions by means of which business is conducted. There is no need for concern over usurious interest rates, for example, if the business of lending money is forbidden.

In terms of economic reality, the sale of California wine cannot be promoted in Washington at the wholesale level for the simple reason that there are no wholesalers of California wine, either public or private. In its state liquor stores Washington conducts what can only be characterized as a strictly retail business (Comp. pars. 14-16, 20-24). On the other hand, there are 135 private wholesalers engaged in the promotion as well as the sale and distribution of Washington wine (Comp. pars. 9, 11).

At the retail level, California is equally blocked from effective promotion of the sale of California wine by operation of discriminatory Washington laws. The Complaint alleges that by reason of the discriminatory pricing and sales policies of the Washington State Liquor Control Board with respect to California wine (Comp. pars. 20-31) "the State of Washington has destroyed the economic incentive of its retail licenses to deal in California wine" (Comp. par. 36(c)). It is futile to attempt the promotion of sales by retail licensees who are forced to compete with their one source of supply for the trade of consumers

and to pay the same retail price per bottle as any consumer. Further, it is no more practicable for California to engage in sales promotion work at the retail level, because of the number of retail licensees (see Comp. par. 46), than it would be for producers of Washington wine. Granted the privilege of a free choice in the matter, Washington wine producers utilize the services of the private wholesalers to promote sales at the retail level, rather than deal directly with the 4,800 retail licensees scattered throughout Washington. The only wine dealer in Washington which might have an economic incentive to promote the sale of California wine, the State Liquor Control Board, is prevented by law from doing so (R.C.W. 66.08.060; Comp. App. A, p. ii).

Washington concedes that, for purposes of the instant motion, the allegations of the Complaint must be taken as true (Wash. Br. p. 2). Under the circumstances alleged, which, as alleged, arise directly from the operation of discrimintory Washington statutes and regulations, it is naive to contend that California is "in fact free to conduct promotional activities", and it contravenes the Complaint to add that California has "fully exercised its privilege to do so" (Wash. Br. p. 15).

4. THE TWENTY-FIRST AMENDMENT LITERALLY HAS NO APPLICATION TO THIS CASE.

Section 2 of the Twenty-first Amendment reads:

> "*The transportation or importation into* any State, Territory, or possession of the United States for delivery or use therein *of intoxicating liquors,* in violation of the laws thereof, *is hereby prohibited.*" (Emphasis added).

The very words of the Amendment indicate that its effect is limited to *the transportation or importation into* a state in violation of its laws. In this case California does not complain of Washington laws which govern and control the "transportation or importation into" Washington of California wine. The official acts of Washington complained of herein deal exclusively with the discriminatory treatment accorded to California wine after it has been legally imported into Washington (See Comp. par. 2). It is thus apparent that the Twenty-first Amendment can have no effect upon, and hence cannot justify, the discriminations complained of—neither the discriminatory restrictions upon California's own interstate sales promotion program, nor the discriminatory burdens placed upon the interstate commerce in California wine after it has been lawfully transported into Washington for marketing to ultimate consumers.

None of the cases relied upon by Washington in discussing the Commerce Clause in the light of the Twenty-first Amendment (Wash. Br. pp. 50-55)—in fact, no prior decision of this Court—has any bearing here. Thus, *State Board of Equalization* v.

Young's Market, 299 U.S. 59, involved the licensing of acts of importation; *Mahoney v. Joseph Triner Corp.,* 304 U.S. 401, involved a statute which required that liquor transported into the state have its brand name registered in the United States Patent Office, i.e., a condition of importation; *Indianapolis Brewing Co. v. Liquor Commission,* 305 U.S. 391, and *Joseph S. Finch & Co. v. McKittrick,* 305 U.S. 395, involved statutes which prohibited the importation of beer from other states which had themselves place certain restrictions upon the importation of beer.

The most recent pronouncements of the Court on the subject of the Twenty-first Amendment support the contention here made; that is, that the Twenty-first Amendment applies literally only to "the transportation or importation into" a state "for delivery or use therein." In *Duckworth v. Arkansas,* 314 U.S. 390, and again in *Carter v. Virginia,* 321 U.S. 131, the Court declined to interpret the Amendment as including within its scope state police regulations dealing with the *through transportation* of alcoholic beverages.

Washington's Brief does not even discuss the fundamental contention of California: that the discriminations arising from the official acts of Washington complained of violate the Commerce Clause (Calif. Br. pp. 45-46). Against this charge, Washington's sole reliance is upon the Twenty-first Amendment. It assumes, without argument, that this case involves the prohibition or regulation of the act of transporting or importing liquor into the State of Washington

and, hence, is within the reach of the Twenty-first Amendment. This basic assumption is without warrant. It ignores the allegations of the Complaint, taken as a whole, and the demonstration in the California Brief (pp. 38-39) that this case involves, not regulation of importations, but—

> ". . . discriminations practiced by the State of Washington against California wine *lawfully admitted* into Washington, in favor of Washington wine." (Calif. Br. p. 39, emphasis added).

CONCLUSION.

For all of the foregoing reasons, as well as those previously urged in the California Brief, the Motion for Leave to File a Complaint of the State of California should be granted.

Dated, May 5, 1958.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General of the State of California,
WALLACE HOWLAND,
Assistant Attorney General of the State of California,
LEONARD M. SPERRY, JR.,
Deputy Attorney General of the State of California,
Attorneys for Plaintiff.

CERTIFICATE OF SERVICE.

The undersigned, being first duly sworn, deposes and says:

That on the 5th day of May, 1958, he served the within and foregoing "Reply Brief of the State of California in Support of its Motion for Leave to File a Complaint" upon the State of Washington, the defendant, as prescribed by Rules 9 and 33 (par. 3(b)) of said Court.

He deposited at the post office at San Francisco, two copies of the said Reply Brief, securely enclosed in an envelope, air mail postage prepaid, addressed to each of the following officials of said defendant State at his post office address, as shown below:

Honorable Albert D. Rosellini,
Governor of the State of Washington,
State Capitol,
Olympia. Washington.

Honorable John J. O'Connell,
Attorney General of the State of Washington,
Temple of Justice,
Olympia, Washington.

WALLACE HOWLAND,
Assistant Attorney General of the State of California.

Sworn to before me this 5th day of May, 1958.

(Seal)

IRENE FALVEY,
Notary Public in and for the City and County of San Francisco, State of California.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 12, Original

STATE OF CALIFORNIA,
Plaintiff,

vs.

STATE OF WASHINGTON,
Defendant.

PETITION FOR REHEARING ON THE ORDER OF THE COURT DENYING LEAVE TO FILE THE COMPLAINT HEREIN.

EDMUND G. BROWN,
Attorney General of the State of California.

WALLACE HOWLAND,
Assistant Attorney General of the State of California,
600 State Building, San Francisco 2, California,
Attorneys for Plaintiff.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 12, Original

STATE OF CALIFORNIA,
Plaintiff,

vs.

STATE OF WASHINGTON,
Defendant.

PETITION FOR REHEARING ON THE ORDER OF THE COURT DENYING LEAVE TO FILE THE COMPLAINT HEREIN.

The State of California respectfully asks the Court to reconsider its Order dated November 10, 1958, denying California's Motion for Leave to File a Complaint herein, and to grant California an opportunity to brief and advise the Court concerning the merits of the substantive issues raised by the Complaint.

The ground for this request is that the Court, in basing its denial of leave to file upon substantive reasons which go to the merits, rather than upon juris-

dictional considerations, has unexpectedly departed from its long-established practice in deciding motions in similar cases, with resulting procedural prejudice to California. In short, the Court has determined the substantive law of the case in advance of the filing of the Complaint, and without having received the brief and argument of California in support of the merits of its case.

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1. **THE COURT HAS DENIED LEAVE TO FILE ON SUBSTANTIVE, RATHER THAN JURISDICTIONAL GROUNDS.**

On November 10, 1958, the Court entered the following Order herein:

> "Per Curiam: The motion for leave to file a bill of complaint is denied. U. S. Const. Amend. XXI, Sec. 2; *Indianapolis Brewing Co. v. Liquor Control Commission,* 305 U. S. 391; *Joseph S. Finch & Co. v. McKittrick,* 305 U. S. 395; *Mahoney v. Joseph Triner Corp.,* 304 U. S. 401; *State Board of California v. Young's Market Co.,* 299 U. S. 59."

The authorities cited do not deal with the original jurisdiction of the Court or the manner of its exercise. None of the cases cited arose in the original jurisdiction of the Court. None of them have any bearing upon the questions previously considered by the Court in deciding a motion by a state, as plaintiff, seeking to invoke the original jurisdiction.

The four cases cited involved only the application and construction of the Twenty-first Amendment.

They relate exclusively to the substantive questions involved in the ultimate disposition of the case on its merits.

With deference to the Court's undoubted authority to summarily dispose of the case, we submit that the effect of the Court's Order is to determine the substantive law of the case without California having its day in court to brief and argue these questions for the Court's consideration.

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2. THE COURT HAS PREVIOUSLY DECIDED APPLICATIONS TO INVOKE ITS ORIGINAL JURISDICTION EXCLUSIVELY ON THE BASIS OF JURISDICTIONAL CONSIDERATIONS. CALIFORNIA HAS RELIED UPON THE ESTABLISHED PRACTICE OF THE COURT.

So far as can be ascertained from the reported decisions, the Court has previously decided applications to invoke its original jurisdiction on the basis of jurisdictional considerations, such as the standing of the plaintiff state to sue,[1] the availability of an alternative trial forum,[2] the existence of a controversy which is judicially cognizable,[3] and lack of sovereign consent

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[1] *Missouri v. Illinois*, 180 U. S. 208 [1901].
Georgia v. Tennessee Copper Co., 206 U. S. 230 [1907].
Oklahoma v. Cook, 304 U. S. 387 [1938].
Georgia v. Pennsylvania R. Co., 324 U. S. 439 [1945].
Arkansas v. Texas, 346 U. S. 368 [1953].

[2] *Massachusetts v. Missouri*, 308 U. S. 1 [1939].
Louisiana v. Cummins, 314 U. S. 580 [1941].
Texas v. I.C.C., 258 U. S. 158 [1922].

[3] *Louisiana v. Texas*, 176 U. S. 1 [1900].
Massachusetts v. Mellon, 262 U. S. 447 [1923].
Oklahoma v. Atchison T. & S.F. R. Co., 220 U. S. 277 [1911].
United States v. West Virginia, 295 U. S. 463 [1935].
Massachusetts v. Missouri, 308 U. S. 1 [1939].

to be sued.[4] *We have not found any prior case in the original jurisdiction in which leave to file was denied solely because of the Court's determination at that time of the substantive questions involved in the consideration of the merits of such case.*[5]

In this case California has been necessarily guided by the practice which the Court has molded over the years in controlling the exercise of its original jurisdiction. That practice has changed in one respect which is significant here. No longer is the application of a plaintiff state to invoke the original jurisdiction "usually granted as of course" (*Kansas v. United States,* 204 U. S. 331, 337 [1907]), the question of jurisdiction being reserved and subsequently determined after the complaint was filed, either on motion to dismiss (*Kansas v. United States, supra*) or on demurrer (*Louisiana v. Texas, supra* [1900]; *Missouri v. Illinois, supra* [1901]). Under this former practice, the complaint having been filed, it was, of course, subject to attack for want of legal merit as

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[4] *Oregon v. Hitchcock,* 202 U. S. 60 [1906].
Monaco v. Mississippi, 292 U. S. 313 [1934].
Arizona v. California, 298 U. S. 558 [1936] (Indispensable party not within Court's jurisdiction).

[5] *Alabama v. Texas,* 347 U. S. 272 [1954] is hardly an exception. The Court denied leave to file because the case involved the disposition of property of the United States. After thorough briefing on the questions presented by the complaint, the Court held that the power of disposal of federal property is entrusted to Congress "without limitation" and that "it is not for the courts to say" how it should be exercised. This is the same as holding that the controversy was political in nature and was not a justiciable controversy between the states in which the Court would have jurisdiction to grant the relief prayed for. Cf. *Massachusetts v. Mellon,* 262 U. S. 447. Thus the question of the Court's jurisdiction was inseparable from the principal question presented by the complaint.

well as for want of jurisdiction. Even then, however, the Court refused to consider substantive matters until jurisdictional questions had been settled. "The question of jurisdiction, of course, precedes any inquiry into the merits." (*Oregon v. Hitchcock,* 202 U. S. 60, 68 [1906]).

In recent years, the Court has understandably become increasingly concerned with the need "to protect this Court from an abuse of the opportunity to resort to its original jurisdiction" (*Massachusetts v. Missouri, supra,* 308 U. S. at 19 [1939]). Where prejudice to substantive rights would not result, it has considered the availability of an alternative trial forum (*Massachusetts v. Missouri, supra,* 308 U. S. at 18-20; *Georgia v. Pennsylvania R. Co., supra,* 324 U. S. at 464 [1945]) in order to minimize interference "with the discharge of our ever increasing appellate duties" and to achieve "a more efficient administration of justice" (Stone, C.J., dissenting in *Georgia v. Pennsylvania R. Co., supra,* 324 U. S. at 470). Consistent with these concerns, the Court now requires that its consent be given to the invocation of its original jurisdiction prior to the filing of the complaint (Rule 9).

First things should come first, in the administration of justice as well as in other affairs. The time and energy of the Court, and of all interested parties as well, can best be used by determining the jurisdiction of the Court in an original proceeding before proceeding to a consideration of the merits. This, indeed, has been the course and practice followed by the

Court in the years last past. Hence, it is not surprising that, so far as can be determined from the reported cases, the Court has consistently given or withheld its consent to filing solely on the basis of jurisdictional, and not substantive considerations.

This practice is especially suited to a case such as the instant case, where the issues are not factual but consist solely of questions of law. To fully brief and argue complex questions of constitutional interpretation in connection with a Motion for Leave to File would be to submit the entire case in advance of the filing of the complaint. Such an anachronism would defeat the objectives of the Court in requiring, under the present practice, that its consent be obtained to the actual filing of the complaint.[8] The rationale of the present practice bears close resemblance to that underlying the common law plea to the jurisdiction: both are calculated to raise the jurisdictional issue in advance of any other proceedings.

These considerations were controlling in the preparation of California's briefs and argument in support of its Motion for Leave to File. Accordingly, California addressed itself primarily to the applicable jurisdictional considerations which the Court in prior cases has regarded as significant: plaintiff's standing to sue (Calif. Brief, pp. 11-30), suit against defendant

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[8]On the present state of the record, with California's Complaint not yet filed, there is no question before the Court to which the Twenty-first Amendment or the decisions cited in support of its Order have any relevance whatever. The authorities cited relate to the merits of a case which is not yet before the Court for determination.

in its official capacity as a state (p. 31), non-availability of an alternative forum in view of the exclusive nature of the Court's original jurisdiction over controversies between two states (pp. 32-34), non-existence of private litigation raising the same issues (pp. 35-36). The substantive issues were delineated to establish the existence of a justiciable controversy between the parties (pp. 36-51). That California did not even attempt to fully brief, analyze, or argue the substantive law of the case is apparent on the face of the California Brief. Consistently the Brief outlines, in future tense, the position that *will be taken* by California, in the event jurisdiction of the case is taken by the Court. For example, after listing the substantive questions raised by the Complaint *not yet before the Court,* the Brief states:

> "It *will* be the position of California on the merits of this important controversy that . . ." (Calif. Brief, p. 38).

Numerous other positions are sketched similarly in future tense (pp. 39, 46, 47, 51) and with such brevity that they cannot be taken as supportable without further elaboration in the due course of the litigation.

In these circumstances, California is surprised and dismayed that the Court should deny leave to file for substantive reasons going to the merits of the case.

California may have misjudged the willingness of the Court to treat Washington's objections to the Motion for Leave to File as a general demurrer on which the substantive law of the case could and would be

determined. As we have said, however, such a disposition is not reflected in the practice or the decisions of the Court in prior cases of this type by which, perforce, California has been guided in this litigation.

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3. THE PREJUDICE RESULTING FROM THE ORDER.

The Court is, of course, the final arbiter of the constitutional questions comprising the merits of this case. Moreover, its appellate jurisdiction reaches every court in the land, both state and federal. From this it follows that the substantive reasons given by the Court for the denial of its original jurisdiction will give the Court's Order a much different effect than would be the case had the denial been based, as it has in prior cases, on jurisdictional grounds.

Where the Court denies its original jurisdiction for jurisdictional reasons, there is no prejudice to the substantive position of the rejected plaintiff. Indeed, it is evident that the Court has upon occasion denied its original jurisdiction only to compel the plaintiff to utilize another forum for trial purposes (*Massachusetts v. Missouri, supra;* see *Georgia v. Pennsylvania R. Co., supra*). In such circumstances, the plaintiff is not substantively prejudiced in presenting his case to such other forum as may have jurisdiction to try the cause.

On the other hand, the Court having based its denial on substantive grounds, and having in mind the appellate jurisdiction of the Court, its Order has the undoubted effect of determining the law of the case

in every court throughout the Nation. The significance of this is even greater than might appear at first glance because of the *parens patriae* character of some of the causes of action alleged in California's Complaint. Numerous citizens of California, as well as the State, have suffered legal injury from the official acts of Washington complained of. These other potential plaintiffs may have access to the jurisdiction of the lower federal courts for the redress of their legal injuries (28 U.S.C. § 2281), even if the State of California does not (28 U.S.C. § 1251(a)(1)), and, in addition, there is the separate question of suit in the courts of the State of Washington.

From a practical viewpoint, however, these jurisdictional possibilities will be of no avail in the light of the substantive implications of the Court's Order herein.

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4. THE SUBSTANTIVE QUESTIONS ARE SO IMPORTANT THEY SHOULD NOT BE DECIDED WITHOUT FURTHER HEARING.

It is significant that *it was the Attorney General of California who presented to the Court the views which* it adopted in the leading case of *Young's Market.*[7]

California would be the last state in the Union to disagree with the view expressed by Mr. Justice Black that ". . . local, not national, regulation of the liquor traffic is now the general constitutional policy" (Con-

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[7]Cited by the Court in support of its Order herein, its full name is *State Board of Equalization of the State of California, et al. v. Young's Market Company, et al., supra.*

curring Opinion, *Carter v. Virginia,* 321 U. S. 131, 138 [1944]).

The position to be taken by California on the merits of this case is not a return to federalism. It does not involve any abridgment or limitation of the power of the several states under the Twenty-first Amendment to make importations of liquor conform to their respective and individually determined policies concerning liquor regulation.

This case concerns a rarity in the American economic system in the form of state ownership and state operation of a large commercial enterprise. The policies and the regulations laid down by the State of Washington for the conduct of its state-owned retail liquor stores have the force of law. It is that law whose constitutionality is challenged in this case.

This case presents for the first time the questions which the Court expressly reserved in *Young's Market* when it denied that its decision therein did not involve a declaration that the Twenty-first Amendment "freed the states from all restrictions upon the police power to be found in other provisions of the Constitution" (299 U. S. 59, 64).

Implicit in the Court's Order is the denial of civil rights guaranteed by the Constitution not previously considered by the Court. We submit that questions of such importance should not be decided summarily and without further consideration.

5. CONCLUSION.

If this Petition for Rehearing is granted, it will be the purpose of California to fully brief the Court on the merits of the substantive questions raised by the Complaint. This has not previously been done for the reasons heretofore stated. If it should have been done, then California prays the Court's indulgence.

Dated, San Francisco, California,
November 26, 1958.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General of the State of California,

WALLACE HOWLAND,
Assistant Attorney General of the State of California,

Attorneys for Plaintiff,
State of California.

CERTIFICATE

The undersigned, one of the attorneys for plaintiff in this proceeding, hereby certifies that the foregoing Petition for Rehearing is presented in good faith and not for delay.

WALLACE HOWLAND.

Certificate of Service

The undersigned, a member of the bar of the Supreme Court of the United States, and one of the counsel of record for the plaintiff, hereby certifies:

That on the 26th day of November, 1958, he served the within and foregoing "Petition for Rehearing on the Order of the Court Denying Leave to File the Complaint Herein" upon the State of Washington, the defendant, as prescribed by Rules 9 and 33 (par. 3(b)) of said Court:

He deposited in the post office at San Francisco, California, two copies of the said Petition for Rehearing, securely enclosed in an envelope, air mail postage prepaid, addressed to each of the following officials of said defendant State at his post office address, as shown below:

Honorable Albert D. Rosellini,
Governor of the State of Washington,
State Capitol,
Olympia, Washington.

Honorable John J. O'Connell,
Attorney General of the State of Washington,
State Capitol,
Olympia, Washington.

That at the same time he deposited in the same post office two further copies of the said Petition for Rehearing, similarly enclosed with air mail postage prepaid, addressed to each of the following officials of the

State of New York appearing as Amicus Curiae at his post office address as shown below:

Honorable Averell Harriman,
Governor of the State of New York,
The Capitol,
Albany 1, New York.

Honorable Louis J. Lefkowitz,
Attorney General of the State of New York,
The Capitol,
Albany 1, New York.

WALLACE HOWLAND.